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CASES

ON THE

AMERICAN LAW OF MINING

SELECTED AND ARRANGED

By

GEORGE P. COSTIGAN, JR.

Professor of Law in Northwestern University

INDIANAPOLIS
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TO MY COLLEAGUES

IN

THE NORTHWESTERN UNIVERSITY

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PREFACE

The preparation of a case-book on the American Law of Mining has been difficult not only because of the statutory nature of the subject, but also because of the excessive length of so many of the mining law cases and of the necessity of so limiting the number of pages of the case-book that it can be covered in the time which the various law schools can fairly allot to mining law. In eliminating from the selected cases all extraneous matter, the compiler has endeavored to leave in the statements of facts and in the opinions everything of value to the determination of the mining law points involved. All omissions from the cases are indicated in the footnotes and by the use of stars in the text.

After due consideration it seemed best not to include in the appendix anything more than certain selected passages from the United States mining laws. The mining regulations of the General Land Office might well have been inserted, but because of the large amount of space which they would occupy and because of the desirability of having each student provide himself with the latest revision of these regulations they were omitted. A copy of these regulations can be obtained from the Commissioner of the General Land Office, Washington, D. C.

While selected United States mining laws are given in the appendix, quotations from these laws and from the mining regulations of the General Land Office are given also at appropriate places throughout the case-book in the hope that thereby the work of student and of teacher will be facilitated.

GEORGE P. COSTIGAN, JR.

Chicago, Ill., August 1, 1912.

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CASES ON MINING

CHAPTER I.

PRELIMINARY DEFINITIONS.

Section 1.—Lodes or Veins and their Apexes.

FEDERAL STATUTES.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

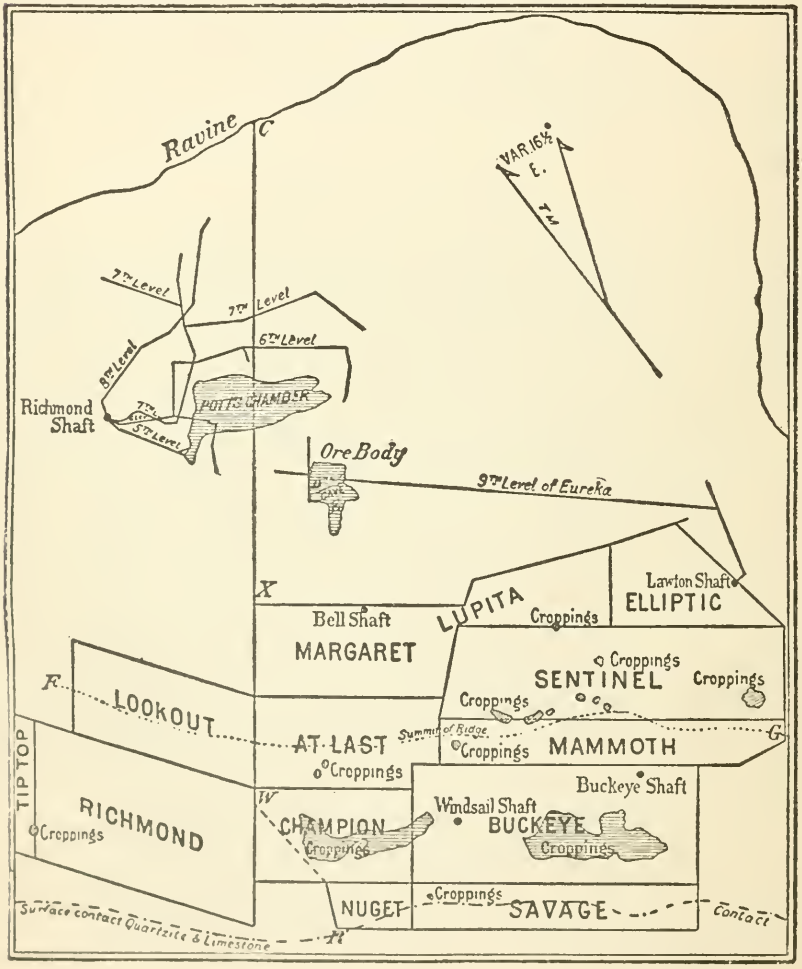
SEC. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. * * *

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. Rev. St. U. S. §§ 2319, 2320, 2322.

EUREKA CONSOL. MIN. CO v. RICHMOND MIN. CO.

1877. Circuit Court, D. Nevada.
4 Sawy. (U. S.) 302, 9 Morr. Min. Rep. 578.

The accompanying diagram represents the surface location of the Champion, At Last, Margaret or Lupita, Nugget, Savage, Buckeye, Mammoth, Sentinel and Elliptic mining claims of the Eureka Company, plaintiff, and of the Richmond, Lookout and Tip-top claims of the Richmond Company, defendant; the Lawton or Eureka



shaft, and the ninth level therefrom connecting with ore body D E; the Richmond shaft and levels therefrom, and the Potts chamber from which ore has been taken through the Richmond fifth level; the line R W X, described in the agreement, and this line extended to C. The dotted line represents the surface line of contact between the quartzite and limestone. South of this line is a belt of quartzite, and north of it a belt of metamorphosed limestone, and north of this limestone is a belt of shale. The ore bodies are found in the metamorphosed limestone between the quartzite and shale. This belt of limestone bounded by the quartzite and shale extends nearly east and west over one mile, and varies in width from five to eight hundred feet on the surface to from two to four hundred feet at the greatest depth of working, which is about nine hundred feet. The Potts chamber is about five hundred feet below the surface. The quartzite and limestone dip to the northward at an angle of about 45° from the horizon.

In 1873, the Eureka Company, owned the Lookout claim, and the Richmond Company found on the surface in the Richmond claim, and followed down on its dip to the northward under the Lookout surface a large body of ore. The Eureka Company claiming the ore under the Lookout surface, thereupon sued the Richmond Company to determine the title thereto, and in settlement of that litigation an agreement in writing was made on the sixteenth day of June, A. D. 1873, between the plaintiff, the Eureka Consolidated Mining Company, of the first part, and the defendant, the Richmond Mining Company of Nevada, party of the second part, which provided:

"Whereas, differences have arisen, and now exist, between the parties hereto in respect to the ownership and right of possession of certain mining ground, known as the Lookout ground or claim * * * and of the ores, metals and deposits found in and under said ground; and whereas an action is, or certain actions are, now pending in the courts of the state of Nevada, wherein the party hereto of the first part is plaintiff, and the party hereto of the second part and others are defendants, for the recovery * * * of the possession of the ground and of the ores therein contained, etc.; and whereas, the said parties have agreed to settle all the differences between them, and put an end to the litigation now pending as aforesaid;

"Now, therefore, this agreement witnesseth, that the said party of the first part, for and in consideration of the sum of $85,000 * * * and the further covenants, agreements, and conditions hereinafter contained * * * has agreed, and does hereby agree, to convey to the said party of the second part, its successors and assigns, with warranty against its own acts, all that certain lot, piece or parcel of land or mining ground * * * known as the Lookout ground or claim; and also all the mining ground and claim lying on the north-westerly side of a certain line, commencing at the north-

easterly corner of the Margaret mining ground or claim, which corner is marked X on the map or plan hereto annexed, and made part of this agreement; running thence in a south-westerly direction along the edge of said Margaret ground, the At Last ground, and the Champion ground, to a point marked W on said map; thence southerly to the north-easterly corner of the Nugget ground; thence in a south-westerly direction along the edge of said Nugget ground, to the north-westerly corner thereof at the point marked R on said map or plan; together with all the ores, precious metals * * * and all veins, lodes, legdes, deposits, dips, spurs or angles on, in, or under the same contained * * *; and the said party of the first part further agrees not to protest against or put any obstacle in the way of the party of the second part in their application for a United States patent to the Richmond or other lodes or veins, provided such application does not conflict or cross the aforesaid line agreed upon * * *; and the said party of the second part, for the consideration aforesaid, hath further agreed, and doth hereby further agree to convey unto the said party of the first part, with warranty against its own acts, all right, title, or interest in or to any and all the land or mining ground, * * * on the south-easterly side of the line hereinbefore mentioned and laid down on the said map hereto annexed, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs and angles on, in or under the said land or mining ground, or any part thereof. It being the object and intention of the said parties hereto to confine the workings of the party of the second part to the north-westerly side of the said line continued downward to the center of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties."

Conveyances were also made in pursuance of this agreement. After this agreement and settlement, the defendant followed the ore body found in the Richmond and Lookout claims downward toward the northward on the dip, and eastward on the general course or strike of the underlying quartzite and overhanging shale to the Potts chamber, where the body of ore extended eastward across the line W X, produced northward from X to C. The ore body on the line from the Richmond to the Potts chamber varied greatly in size at different points, being alternately contracted or pinched to a small seam, then widening into larger bodies, but there was a continuous connection. The defendant claimed and worked that part of the chamber to the eastward of said line W X produced to C, whereupon the plaintiff claiming that portion of the ore body as being on the dip of its portion of the lode brought this action to recover the possession.

The other facts are sufficiently stated in the opinion of the court.

FIELD, CIRCUIT JUSTICE.[1]—This is an action for the possession of certain mining ground, particularly described in the complaint, situated in Eureka mining district, in the county of Eureka, in the state of Nevada. The plaintiff is a corporation created under the laws of California, and the defendant, the Richmond Mining Company, is a corporation created under the laws of Nevada. * * *

The premises in controversy are of great value, amounting, by estimation, to several hundred thousands of dollars, and the case has been prepared for trial with a care proportionate to this estimate of the value of the property; and the trial has been conducted by counsel on both sides with eminent ability.

Whatever could inform, instruct or enlighten the court, has been presented by them. Practical miners have given us their testimony as to the location and working of the mine. Men of science have explained to us how it was probable that nature, in her processes, had deposited the mineral where it is found. Models of glass have made the hill, where the mining ground lies, transparent, so that we have been able to trace the course of the veins, and see the chambers of ore found in its depths. For myself, after a somewhat extended judicial experience, covering now a period of nearly twenty years, I can say that I have seldom, if ever, seen a case involving the consideration of so many and varied particulars, more thoroughly prepared or more ably presented. And what has added a charm to the whole trial has been the conduct of counsel on both sides, who have appeared to assist each other in the development of the facts of the case, and have furnished an illustration of the truth that the highest courtesy is consistent with the most earnest contention.

The mining ground which forms the subject of controversy is situated in a hill known as "Ruby Hill," a spur of Prospect mountain, distant about two miles from the town of Eureka, in Nevada. Prospect mountain is several miles in length, running in a northerly and southerly course. Adjoining its northerly end is this spur called "Ruby Hill," which extends thence westerly, or in a south-westerly direction. Along and through this hill, for a distance slightly exceeding a mile, is a zone of limestone, in which, at different places throughout its length, and in various forms, mineral is found, this mineral appearing sometimes in a series or succession of ore bodies more or less closely connected, sometimes in apparently isolated chambers, and at other times in what would seem to be scattered grains. And our principal inquiry is to ascertain the character of this zone, in order to determine whether it is to be treated as constituting one lode, or as embracing several lodes, as that term is used in the acts of congress of 1866 and 1872, under which the parties have acquired whatever rights they possess. In this inquiry, the first thing to be settled is the meaning of the term in those acts. This

[1] Parts of the opinion are omitted.

meaning being settled, the physical characteristics and the distinguishing features of the zone will be considered.

Those acts give no definition of the term. They use it always in connection with the term "vein." The act of 1866 provided for the acquisition of a patent by any person or association of persons claiming "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper." The act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the term should, therefore, be sufficiently broad to embrace deposits of the several metals or ores here mentioned. In the construction of statutes, general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a "lode" given by geologists is, that of a fissure in the earth's crust filled with mineral matter, or more accurately, as aggregations of mineral matter containing ores in fissures. See Von Cotta's Treatise on Ore Deposits, Prime's Translation, 26. But miners used the term before geologists attempted to give it a definition. One of the witnesses in this case, Dr. Raymond, who for many years was in the service of the general government as commissioner of mining statistics, and in that capacity had occasion to examine and report upon a large number of mines in the states of Nevada and California, and the territories of Utah and Colorado, says that he has been accustomed, as a mining engineer, to attach very little importance to those cases of classification of deposits which simply involve the referring of the subject back to verbal definitions in the books. The whole subject of the classification of mineral deposits he states to be one in which the interests of the miner have entirely overridden the reasonings of the chemists and geologists. "The miners," to use his language, "made the definition first. As used by miners, before being defined by any authority, the term 'lode' simply meant that formation by which the miner could be led or guided. It is an alteration of the verb 'lead;' and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode." The term "lode-star," "guiding-star," or "north star," he adds, is of the same origin. Cinnabar is not found in any fissure of the earth's crust, or in any lode, as defined by geologists, yet the acts of congress speak, as already seen, of lodes of quartz, or rock in place, bearing cinnabar. Any definition of "lode," as there used, which did not embrace deposits of cinnabar, would be as defective as if it did not embrace deposits of gold or silver. The definition must apply to deposits of all the metals named, if it apply to a deposit of any one of them. Those acts were not drawn by geologists or for geologists; they were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive

such a construction as will carry out this purpose. The use of the terms "vein" and "lode" in connection with each other in the act of 1866, and their use in connection with the term "ledge" in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts, which a scientific definition of any one of these terms might impose.

It is difficult to give any definition of the term as understood and used in the acts of congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.[2] It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.

Examining, now, with this definition in mind, the features of the zone which separate and distinguish it from the surrounding country, we experience little difficulty in determining its character. We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness; and on its north side, for a like extent, by a belt of clay, or shale, ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to be separated by a bare seam, less than an inch in width. From that point they diverge, until, on the surface in the Eureka mine, they are about five hundred feet apart, and on the surface in the Richmond mine, about eight hundred feet. The quartzite has a general dip to the north, at an angle of about forty-

[2] In Hayes v. Lavagnino, 17 Utah 185, 53 Pac. 1029, 1033, after quoting this paragraph to here, Bartch, J., for the court, said:

"It would seem, from these considerations, that any deposit of mineral matter, or indication of a vein or lode, found in a mineralized zone or belt within defined boundaries, which a person is willing to spend his time and money to follow in expectation of finding ore, is the subject of a valid location, and that, when metallic vein matter appears at the surface, a valid location of a ledge deep in the ground, to which such vein matter leads, may be made."

five degrees, subject to some local variations, as the course changes. The clay or shale is more perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface, these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked, they are now only from two to three hundred feet apart.

The limestone found between these two limits—the wall of quartzite and the seam of clay or shale—has, at some period of the world's history, been subjected to some dynamic force of nature, by which it has been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, except in places of a few feet each, so far as explorations show, all traces of stratification; thus specially fitting it, according to the testimony of the men of science, to whom we have listened, for the reception of the minerals which, in ages past, came up from the depths below in solution, and was deposited in it. Evidence that the whole mass of limestone has been, at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. This broken, crushed and fissured condition pervades, to a greater or less extent, the whole body, showing that the same forces which operated upon a part, operated upon the whole, and at the same time. Wherever the quartzite is exposed, the marks of attrition appear. Below the quartzite no one has penetrated. Above the shale the rock has not been thus broken and crushed. Stratification exists there. If in some isolated places there is found evidence of disturbance, that disturbance has not been sufficient to affect the stratification. The broken, crushed and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestone in the vicinity.

In this zone of limestone numerous caves or chambers are found, further distinguishing it from the neighboring rock. The limestone being broken and crushed up as stated, the water from above readily penetrated into it, and, operating as a solvent, formed these caves and chambers. No similar cavities are found in the rock beyond the shale, its hard and unbroken character not permitting, or at least opposing such action from the water above.

Oxide of iron is also found in numerous places throughout the zone, giving to the miner assurance that the metal he seeks is in its vicinity.

This broken, crushed and fissured condition of the limestone, the presence of the oxides of iron, the caves or chambers we have mentioned, with the wall of quartzite and seam of clay bounding it, give to the zone, in the eyes of the practical miner, an individuality, a oneness as complete as that which the most perfect lode in a geological sense ever possessed. Each of the characteristics named, though produced at a different period from the others, was undoubtedly caused

by the same forces operating at the same time upon the whole body of the limestone.

Throughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock. According to the opinions of all the scientific men who have been examined, this mineral was brought up in solution from the depths of the earth below, and would therefore naturally be very irregularly deposited in the fissures of the crushed matter, as these fissures are in every variety of form and size, and would also find its way in minute particles in the loose material of the rock. The evidence shows that it is sufficiently diffused to justify giving to the limestone the general designation of mineralized matter—metal-bearing rock. The three scientific experts produced by the plaintiff, Mr. Keyes, Mr. Raymond and Mr. Hunt, all of them of large experience and extensive attainments, and two of them of national reputation, have given it as their opinion, after examining the ground, that the zone of limestone between the quartzite and the shale constitutes one "vein" or "lode," in the sense in which those terms are used by miners. Mr. Keyes, who for years was superintendent of the mine of the plaintiff, concludes a minute description of the character and developments of the ground, by stating that in his judgment, according to the customs of miners in this country and common sense, the whole of that space should be considered and accepted as a lead, lode, or ledge of metal-bearing rock in place.

Dr. Raymond, after giving a like extended account of the character of the ground, and his opinion as to the causes of its formation, and stating with great minuteness the observations he had made, concludes by announcing as his judgment, after carefully weighing all that he had seen, that the deposit between the quartzite and the shale is to be considered as a single "vein" in the sense in which the word is used by miners—that is, as a single ore deposit of identical origin, age and character throughout.

Dr. Hunt, after stating the result of his examination of the ground and his theory as to the formation of the mine, gives his judgment as follows: "My conclusion is this: That this whole mass of rock is impregnated with ore; that although the great mass of ore stretches for a long distance above horizontally and along an incline down the foot wall, as I have traced it, from this deposit you can also trace the ore into a succession of great cavities or bonanzas lying irregularly across the limestone and into smaller caverns or chasms of the same sort; and that the whole mass of the limestone is irregularly impregnated with the ore. I use the word 'impregnation' in the sense that it has penetrated here and there; little patches and stains, ore-vugs and caverns and spaces of all sizes and all shapes, irregularly disseminated through the mass. I conclude, therefore, that this great mass of ore is, in the proper sense of the word, a great 'lode,' or a great 'vein,' in the sense in which the word is used by miners; and

that practically the only way of utilizing this deposit, is to treat the whole of it as one great ore-bearing lode or mass of rock."

This conclusion as to the zone constituting one lode of rock-bearing metal, it is true, is not adopted by the men of science produced as witnesses by the defendant, the Richmond Company. These latter gentlemen, like the others, have had a large experience in the examination of mines, and some of them have acquired a national reputation for their scientific attainments. No one questions their learning or ability, or the sincerity with which they have expressed their convictions. They agree with the plaintiff's witnesses as to the existence of the mineralized zone of limestone with an underlying quartzite and an overlying shale; as to the broken and crushed condition of the limestone, and substantially as to the origin of the metal and its deposition in the rock. In nearly all other respects they disagree. In their judgment, the zone of limestone has no features of a lode. It has no continuous fissure, says Mr. King, to mark it as a lode. A lode, he adds, must have a foot-wall and a hanging-wall, and if it is broad, these must connect at both ends, and must connect downward. Here, there is no hanging-wall or foot-wall; the limestone only rests as a matter of stratigraphical fact on underlying quartzite, and the shale overlies it. And distinguishing the structure at Ruby hill from the Comstock lode, the same witness says that the one is a series of sedimentary beds laid down in the ocean and turned up; the other is a fissure extending between two rocks.

The other witnesses of the defendant, so far as they have expressed any opinion as to what constitutes a lode, have agreed with the views of Mr. King. It is impossible not to perceive that these gentlemen at all times carried in their minds the scientific definition of the term as given by geologists, that a lode is a fissure in the earth's crust filled with mineral matter, and disregarded the broader, though less scientific, definition of the miner who applies the term to all zones or belts of metal-bearing rock lying within clearly marked boundaries. For the reasons already stated, we are of opinion that the acts of congress use the term in the sense in which miners understand it.

If the scientific definition of a lode, as given by geologists, could be accepted as the only proper one in this case, the theory of distinct veins existing in distinct fissures of the limestone would be not only plausible, but reasonable; for that definition is not met by the conditions in which the Eureka mineralized zone appears. But as that definition cannot be accepted, and the zone presents the case of a lode as that term is understood by miners, the theory of separate veins, as distinct and disconnected bodies of ore falls to the ground. It is, therefore, of little consequence what name is given to the bodies of ore in the limestone, whether they be called pipe veins, rake veins or pipes of ore, or receive the new designation suggested by one of the witnesses, they are but parts of one greater deposit, which per-

meates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone, from the Jackson mine to the Richmond, inclusive.

The acts of congress of 1866 and 1872 dealt with a practical necessity of miners; they were passed to protect locations on "veins" or "lodes," as miners understood those terms. Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls. In a recent case before the supreme court of the United States, singing birds were held not to be live animals, within the meaning of a revenue act of congress. Reiche v. Smythe, 13 Wall. [80 U. S.] 162. And in a previous case, arising upon the construction of the Oregon donation act of congress, the term, "a single man," was held to include in its meaning an unmarried woman. Silver v. Ladd, 7 Wall. [74 U. S.] 219. If any one will examine the two decisions, reported as they are in Wallace's Reports, he will find good reasons for both of them.

Our judgment being that the limestone zone in Ruby hill, in Eureka district, lying between the quartzite and the shale, constitutes, within the meaning of the acts of congress, one lode of rock bearing metal, we proceed to consider the rights conveyed to the parties by their respective patents from the United States. * * *

Here neither the plaintiff nor defendant could pass outside of the end lines of its own locations, whether they were made before or after those upon which the other party relies. And inasmuch as the ground in dispute lies within planes drawn vertically downward through the end lines of the plaintiff's patented locations, our conclusion is that the ground is the property of the plaintiff, and that judgment must be for its possession in its favor.

The same conclusion would be reached if we looked only to the agreement of the parties made on the sixteenth of June, 1873. At that time the plaintiff owned the patented claim called the Lookout claim, adjoining on the north the Richmond claim. The defendant had worked down from an incline in the Richmond and Tip-top into the ore under the surface lines of the Lookout patent. The plaintiff thereupon brought an action for the recovery of the ground and the ores taken from it. A compromise and settlement followed which are contained in an agreement of that date, and were carried out by an exchange of deeds. A map or plat was made showing the different claims held by the two parties. A line was drawn upon this map, on one side of which lay the Champion, the At Last and the Margaret claims, and on the other side lay the Richmond and the Lookout claims. By the agreement of the parties, the plaintiff on the one hand, was to convey to the defendant the Lookout ground, and also all the mining ground lying on the north-westerly side of the line

designated, with the ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles on, in or under the same, and to dismiss all pending actions against the defendant; and on the other hand, the defendant was to pay to the plaintiff the sum of $85,000, and to convey, with warranty, against its own acts, all its right, title or interest, in and to all the mining ground situated in the Eureka mining district on the south-easterly side of the designated line, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles, on, in or under the same. "It being," says the agreement, "the object and intention of the said parties hereto to confine the workings of the party of the second part (the Richmond Mining Company), to the north-westerly side of the said line continued downward to the center of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties."

The deeds executed between the parties the same day were in accordance with this agreement. The deed of the Richmond Mining Company to the plaintiff conveyed all the mining ground lying on the south-easterly side of the designated line, "together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed."

The line thus designated extended down in a direct line along the dip of the lode would cut the Potts chamber, and give the ground in dispute to the plaintiff. That it must be so extended necessarily follows from the character of some of the claims it divides. As the Richmond and the Champion were vein or lode claims, a line dividing them must be extended along the dip of the vein or lode, so far as that goes, or it will not constitute a boundary between them. All lines dividing claims upon veins or lodes necessarily divide all that the location on the surface carries, and would not serve as a boundary between them if such were not the case. The plaintiff would, therefore, be the owner of the ground in dispute by the deed of the defendant, even if it could not assert such ownership solely upon its patented locations. Our finding, therefore, is for the plaintiff, and judgment must be entered thereon in its favor for the possession of the premises in controversy.[3]

[3] The Richmond Mining Company took an appeal and writ of error in these cases, and the decision was affirmed by the supreme court. Richmond Min. Co. v. Eureka Consol. Min. Co., 103 U. S. 839, 26 L. ed. 557. That court held that the rights of the parties were conclusively fixed by the compromise agreement of June 16, 1873.

STEVENS ET AL. v. WILLIAMS ET AL.

1879. CIRCUIT COURT, D. COLORADO.
23 Fed. 44, 1 Morr. Min. Rep. 557, Carp. Min. Code, 65.

HALLETT, DISTRICT JUDGE (charging jury).[4]—The first matter to which I shall ask your attention is that the reference in the law is to veins or lodes in place, bearing any valuable metals, which are here spoken of. The language of the act is, mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. That is the language of the act used in describing the kind of mines or valuable deposits which may be taken out under the act, and the peculiar feature of that description to which I wish to call your attention is that they are lodes or veins in place. The exact language, as I before read, is "veins or lodes of quartz or other rock"; that is, veins or quartz or other rock, or lodes of quarts or other rock (the last words being added to the first by way of description), that may contain any of these valuable metals. That is to say, any kind of rock bearing any of these metals,—but whatever the rock, whether it be quartz or other rock, it must be in place. And, as to the meaning of these words, "in place," they seem to indicate the body of the country which has not been affected by the action of the elements; which may remain in its original state and condition, as distinguished from the superficial mass which may lie above it. There are quite a number of words which may be applied to that superficial deposit; that which is movable, as contrasted with the immovable mass that lies below, such as alluvium, detritus, debris. Perhaps the last word comes as near as any other that is in use—the word débris. A witness in another case here used a word which he appeared to have invented for the occasion, which appeared to me particularly significant; he called it "tumble stuff," which conveys to my mind pretty distinctly the idea of that which may have been brought to its position by the action of the elements, as distinguished from the vast body of earth which lies below. In speaking of these deposits, which are in veins or lodes, and of the general mass of rock from which they may be distinguished, miners usually call the surrounding mass of rock, in which the lodes or veins are found, the "country" or the "country rock." By that word they signify the character and description of the general body of the mountain, whether it is granite, or gneiss, or syenite, or porphyry, or any other of the many different kinds of rock. They use that word to describe the general mass of rock of which the mountain is composed, as distinguished from that which is found in the vein or lode. And when this act speaks of veins or lodes in place, it means such as lie in a fixed position in the

[4] Parts of the charge to the jury are omitted.

general mass of country rock, or in the general mass of the mountain. As distinguished from the country rock, this superficial deposit may have been brought into its present position by the elements; may have been washed down from above; or may have come there as alluvium or diluvium, from a considerable distance. Now, whenever we find a vein or lode in this general mass of country rock, we may be permitted to say that it is in place, as distinguished from the superficial deposit, and that is true, whatever the character of the deposit may be; that is to say, as to whether it belongs to one class of veins or another; it is in place if it is held in the embrace, is inclosed by the general mass, of the country. And, as to the word "vein" or "lode," it seems to me that these words may embrace any description of deposit which is so situated in the general mass of the country, whether it is described in any one way or another; that is to say, whether, in the language of the geologist, we say that it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit; it matters not what the particular description of it may be; in respect to these distinctions which are observed by geologists in defining the different classes of deposits that lie in the embrace, or are inclosed by, the general mass of the mountain. In all cases I suppose that they are lodes, if not veins. It may be true that many of these deposits will not come under the description of veins, as known to geologists, but if they are not so described,—if they cannot be so correctly described,—they are, at least, lodes, and are recognized as such by miners in their search for them. In other words, whenever a miner finds a valuable mineral deposit in the body of the earth, as I have described it, he calls that a lode, whatever its form may be, and however it may be situated, and whatever its extent in the body of the earth. The books make some distinctions between beds and lodes, and they make distinctions in the different classes of veins, as you have heard from counsel, but these distinctions are not important in relation to this answer of the discovery and taking of these mineral deposits. It has been decided that congress, in passing this act, intended by this description to embrace and include all forms of deposit which are located in the general mass of the mountain, by whatever name they may be known, and the distinctions which are adopted by geologists in respect to the different kinds of veins are not important except for one question and for one purpose, which I may invite your attention to further on. So that we may say, gentlemen, with respect to the case which is now before you, that, whether this may be called a true vein or a contact vein, or a bed; whether it lies with the stratification or transversely to it, the matter is of no importance for the purpose of determining this question; it is in any event a lode, if it lies in place, within the meaning of this act. And it is in place if it is inclosed and embraced in the general mass of the mountain, and fixed and immovable in that position. Perhaps I ought to say further, in view

of some things that were said by counsel in the argument, that it is not material as to the character of the vein matter, whether it is loose and disintegrated, or whether it is solid material. In these lodes the earth that is found in them, the earthly matter which may be washed or treated with water or steam, is often the most valuable part. It was never understood here or elsewhere, so far as I know, that such earthy matter was not embraced in the location, because it was of that character. It is the surrounding mass of country rock; it is that which incloses the lode, rather than the material of which it is composed,—which gives it its character; so that even if it be true, as counsel have stated in the course of their arguments, that this is mere sand,—is a loose and friable material which cannot be called "rock," in the strict definition of that word; if that be true, it does not affect the character of the lode. If it were all of that character, it would still be in a vein or lode in place, if the wall on each side—the part which holds the lode—is fixed and immovable.[5]

[5] In Hyman v. Wheeler, 29 Fed. 347, 353–354, Hallett, J., in charging a jury, in a case where the owner of the Durant mining claim was asserting that the owners of the Emma mining claim were working in the Emma a vein which apexed in the Durant said:

"In the books, and among miners, veins and lodes are invested with many characteristics,—as that they lie in fissures or other openings in the country rock; that they contain materials differing, or in some respects corresponding, with the country rock; that they are of tabular form, and of a banded structure; that some one or several things are commonly associated with the valuable ores; that they have selvages and slickensides in the fissures and openings, and the like. It is not necessary to enumerate all the features by which they are known. Some of these characteristics are said to be common to all lodes and veins, and others of rare occurrence; but, in general, witnesses will take up one or more of them as essential features of a lode or vein, and declare the fact upon the presence or absence of such elements. A party seeking to prove the existence of a lode or vein will naturally rely on any such characteristic that he can find in the ground in dispute, and call witnesses, who will accept that feature as establishing the fact. The party opposed will seek to disprove the proposition advanced against him, and, in addition, to show that all other characteristics of a lode or vein are in the case under consideration entirely wanting. In this way a fierce conflict of testimony is waged as to the existence of one or another distinguishing feature of a lode or vein, and the jury is asked to return a verdict upon the issue thus made. It is apparent, however, that, upon any issue touching the existence of a lode or vein in a place designated, a question whether it has one characteristic or another is a part only of the main question, and, in the presence of other unquestioned elements establishing the existence of a lode or vein, an issue of that kind becomes immaterial. To illustrate that matter, it may be said that, with ore in mass and position in the body of a mountain, no other fact is required to prove the existence of a lode of the dimensions of the ore. As far as it prevails, the ore is a lode, whatever its form or structure may be, and it is not at all necessary to decide any question of fissures, contacts, selvages, slickensides, or other marks of distinction, in order to establish its character. As was said in another case in this court;

"'A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken, and without interruption, may

That is, perhaps, sufficient as to the character of the deposit, and that which may be located in the manner in which the evidence tends to prove that the location was made; and we have now to consider the question which was so much discussed by counsel, as to the location with reference to the top and apex of the vein. And upon that point it is clear, from an examination of the act, that it was framed upon the hypothesis that all lodes and veins occupy a position more or less vertical in the earth, that is, that they stand upon their edge in the body of the mountain; and these words, "top" and "apex," refer to the part which comes nearest to the surface. The words used are "top" and "apex," as if the writer was somewhat doubtful as to which word would best describe or best convey the idea which he had in his mind. It was with reference to that part of the lode

be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied.'

"If, therefore, we look only to the body of ore developed in the Emma location, the existence of which is not denied, and assume it to be of the form and extent developed in the works, there is no difficulty in recognizing it as a lode. Whether it is in the form of a broken mass of blue and brown lime, between regular walls of the same rocks, or a part of such strata in solid formation, mineralized by replacement of some of their constituents with valuable metals, the result is the same, and the name which science may apply to it is of no importance. An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of the act of congress as any other form of deposit. In discussions at the bar, and in the opinions of witnesses, it was assumed that the character of a body of ore, as coming within or falling without the act of congress, could be determined by classifying it as a segregated or contact fissure vein, or as a bed or impregnation of ore; and that it was a matter of importance to ascertain whether the ore was separated from the country rock by planes or strata of that rock visible to the eye. I see no reason for such distinctions. It is true that a lode must have boundaries, but there seems to be no reason for saying that they must be such as can be seen. There may be other means of determining their existence, and continuance, as by assay and analysis; and certainly the form and mode of occurrence of valuable ore, however controlling and influential in determining its geological character, is not a matter upon which it can be excluded from the terms of the act of congress. All that is said on this point proceeds on the theory that the ore developed in the Emma location is of the form and extent there appearing, as distinguished from the mass of limestone in which it is found; that it is upon the line of contact between blue and brown lime, and that such line of contact marks its presence and continuance throughout the works. There is much in the testimony to support that view. That, however, is for your consideration, to be decided upon the weight of evidence.

"If, as contended by defendants, the ore of that mountain is distributed throughout the blue and brown limestones somewhat unequally, but nevertheless generally, and the occurrence of rich ore in the Emma works is fortuitous and accidental, other consideratons arise of which it is not necessary to speak at length. In that case the entire body of blue and brown limestone is taken to be ore-bearing rock, and the plaintiff can assert no claim to it outside his own location. If you accept that view, your verdict should be for defendants. Bearing in mind what has been said, if you decide on the evidence that there is a lode in the Emma ground, you have then to consider whether it is practically continuous from thence to and into the Durant location, with an apex or outcrop in that location."

which comes nearest to the surface that this description was used; probably the words were not before known in mining industry,—at least, they are not met with elsewhere, so far as I am informed. Perhaps they were not the best that could have been used to describe the manner in which the lode should be taken and located. But, whether that be true or not, they are in the act of congress, and there seems to be little doubt as to their meaning; they are not at all ambiguous. In some instances they may, perhaps, refer to the floe of the lode; that is a part of the lode which has been detached from the body of mineral in the crevice, and flowed down on the surface; in others, where there is no such outcrop, they may mean that part which stands in the solid rock, although below a considerable body of the superficial mass which I have attempted to describe to you. We are all agreed, however (the courts and counsel, every one), that that is the meaning of the words; that they are to be taken in some such sense as that,—as being the part of the lode which comes nearest the surface.[6] * * * Congress seems to have appreciated the fact, which is known to all miners, that there are very few, probably no lodes, that are exactly perpendicular to the surface of the earth; they incline one way or the other,—that is, either to the right or left, —extending along the course of the lode. It seems to be universally true that they depart from the perpendicular in one direction or the other, and if, in so departing,—if, in their downward course into the earth, they depart from their side lines, or the planes of those lines extending downward vertically,—then he is to have that part which lies without, as well as within, the surface lines. The language of the act upon that point is, "of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from the perpendicular in their course downward, as to extend outside the vertical side lines of such surface location." Now, it was said with reference to the lode which is now in litigation here,—the position was taken by the counsel for the defendant,—that whenever, in its departure from the vertical course, it reaches an inclination which is greater than forty-five degrees, that then it is no departure from the perpendicular, but from a horizontal plane, and therefore it is not within the terms of the act. That position, gentlemen, is merely a verbal distinction, which goes for nothing at all. Of course, in its departure, it may depart in any degree up to the horizontal plane, and it is still a departure from the perpendicular throughout the whole course, until it comes to a right

[6] "And first we may say, by way of definition, that the top or apex is the end or edge or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will enclose it, the lode may be held by such location."—Hallett, J., in Iron Silver Min. Co. v. Murphy, 3 Fed. 368, 373.

angle from the perpendicular. * * * I agree that if we should ever find a lode which, in its course, extends precisely on the plane of the horizon,—and it is extremely doubtful whether we shall ever find one in that position,—but if we should ever find a lode which is precisely in that position, there may be some difficulty in locating it under this act. * * *

This brings us to a question, gentlemen, which really is the important question in this case, and that is whether there is any lode in the position which has been mentioned by the witnesses; and in that connection, in the consideration of that question, the character of the deposit—as to whether it is a true fissure vein, or a contact deposit, or a bed, or something of that kind—is of some value; because, in respect to fissure veins, we accept the cavity or chasm which is found between walls, and filled with what they call "vein matter," as indicating or showing the existence of the lode, even if the matter which is found in it is not very valuable,—that is, if there is anything which usually accompanies valuable ores or minerals. But, in respect to this kind of deposit, my impression is that it is to be known, called, and regulated as an irregular deposit; one which, if it should be interrupted for any considerable distance,—that is, if what they call the "contact," or junction between the porphyry and lime, should become barren for a considerable distance,—that it should no longer be called a lode. As I understand it, this line which exists when there is a union of rocks of different ages and different formation, may carry ore, or it may not; it may be productive, or it may be barren; and if this should be found at any point in the course to become barren, and remain so for any considerable distance, I do not see how it could be called a lode in that part of it, so that it could be followed with the result to claim what lies beyond. I should say, that with reference to such a line of contact between rocks of different formation, that to find that line of contact in one place, unless there were in it valuable minerals which were carried along with something like a continuous course along the line of contact, that no lode would be discovered. It could not be said that any had been found until such minerals were found. I do not mean by this, that any slight interruption for a few feet of the valuable part of the ore would have the effect to show that the deposit was broken in its continuousness. I do not mean that, nor do I mean that if any dyke or other extraordinary foreign matter should be interposed in the course of the lode so as to cut it off, and it should follow on immediately after that interruption, that would be regarded as such a displacement in the continuity of the deposit as would deprive it of its regular character. Phillpotts v. Blasdel, 8 Nev. 61. Whenever it may appear that the fissure has existed at one time, or at any time, with a continuous body of ore in it, which may have been interrupted by some subsequent convulsion, the character of the deposit would remain the same as if the interruption had never occurred. But if

there was such an intervening space in the "contact," as these witnesses call it, barren in its continuity, as might show a separate and distinct body of ore, which had always been such, I should say that it would not pass with the grant of the first. It may help you, gentlemen, for me to express this in other language, and ask you to extend the line which is laid down on that map (showing), for some distance further, and to suppose that, in the course of that line, you find that there is at the head of the deposit, that nearest the surface, a hundred feet or more of continuous ore lying upon the line between the porphyry and the lime, and then there should be an interruption of a hundred feet or more of this contact which is perfectly barren; the lime and the porphyry coming together carrying nothing whatever, and below that, again, another body similar to that which was found at the head, the position which I think might be taken upon this—the position of these ore bodies—would be that there would be two lodes, rather than one, the first above and the second below; but if there is a continuous body of ore, or practically continuous, and there is no such interruption as exhibits other than a casual and fortuitous displacement, then it would be one lode.

I think, upon that explanation, gentlemen, you will be able to determine whether there is, in that sense, a fixed body of ore, extending from the upper part of these workings to the end of them; if that is its characteristic, then it is to be regarded as one and the same lode, though it may have departed from the side line, to a considerable distance, and have only an angle of thirteen, fourteen or fifteen degrees, as the witnesses have described it, from the plane of the horizon. * * *

JONES ET AL. v. PROSPECT MOUNTAIN TUNNEL CO.

1892. SUPREME COURT OF NEVADA. 21 Nev. 339, 31 Pac. 642.

ACTION by J. E. Jones and others against the Prospect Mountain Tunnel Company to recover the price of ore unlawfully removed from complainants' mine, and for an injunction restraining defendant from removing any more. Plaintiffs had judgment for $5,000 and an injunction was granted. Defendant appeals. Reversed.

The other facts fully appear in the following statement by BIGELOW, J.: * * *

At the plaintiffs' request, the court gave the following instructions: * * *

"No. 4. A vein, lode, ledge, or deposit, within the meaning of the law, is a crack, cavity, or fissure in the earth crust, filled with rock in place, bearing gold, silver, or other valuable mineral. The mineral or rock containing the mineral must be in place; that is to say, in

the place where it was originally formed or deposited. Loose, broken rock, or wash, sand or gravel, float or soil, is not sufficient. The rock containing the mineral must be in place between walls or defined boundaries. The rock must also contain valuable mineral." * * *

BIGELOW, J., (*after stating the facts.*)[7] * * * We are also of the opinion that the definition of what constitutes a lode was erroneous, and while in many cases the error might be harmless, it was, under the circumstances existing here, prejudicial to the defendant. A certain formation, which the defendant claimed to be the ledge, had been traced on its inclination outside the plaintiffs' boundaries, and a large amount of work there done upon it. If this was the ledge, as the defendant claimed, it tended to show that its apex was outside those boundaries. According to the witnesses, it consisted of broken limestone, boulders, low-grade ore, gravel, and sand, which appeared to have been subjected to the action of water. This was found at a depth of several hundred feet, and where there seems to have been no question that it was within the original and unbroken mass of the mountain. So far as was shown, the rock on either side was fixed, solid, and immovable. Mineral matter so situated, no matter where it was originally formed or deposited, is "in place," within the meaning of the law. The manner in which mineral was deposited in the places where it is found is, at the best, but little more than a matter of mere speculation; and to attempt to draw a distinction based upon the mode or manner or time of its deposit would be utterly impracticable and useless. The question was long ago settled by the courts. In Stevens v. Williams, 1 Morr. Min. R. 557, HALLETT, J., said: "And, when this act speaks of veins or lodes in place, it means such as lie in a fixed position in the general mass of country rock, or in the general mass of the mountain. As distinguished from the country rock, this superficial deposit may have been brought into its present position by the elements, may have been washed down from above, or may have come there as alluvium or diluvium, from a considerable distance. Now, whenever we find a vein or lode in this general mass of country rock, we may be permitted to say that it is in place, as distinguished from the superficial deposit, and that is true whatever the character of the deposit may be. * * * It is in place if it is held in the embrace, is inclosed by the general mass, of the country." Upon the second trial of the same case, (Id. 566, 1 McCrary, 480,) Justice MILLER said: "And there I want to say that by 'rock in place' I do not mean merely hard rock, merely quartz rock, but any combination of rock, broken up, mixed up with minerals and other things, is rock, within the meaning of the statute." And again, in Mining Co. v. Cheesman, 116 U. S. 529, 537, 6 Sup. Ct. Rep. 481, the court said: "Excluding the waste, slide, or *debris*

[7] Parts of the statement of facts and of the opinion are omitted.

on the surface of the mountain, all things in the mass of the mountain are in place." See, also, the same case in the circuit court, 2 McCrary, 191, 8 Fed. Rep. 297; Hyman v. Wheeler, 29 Fed. Rep. 353; Cheesman v. Shreeve, 40 Fed. Rep. 787. * * *

Judgment and order refusing a new trial reversed, and cause remanded.

STEVENS ET AL. v. GILL ET AL.

1879. CIRCUIT COURT, D. COLORADO.
23 Fed. 12, 1 Morr. Min. Rep. 576.

[This was an action at law by William H. Stevens and others against Andrew W. Gill and others to determine conflicting claims to mining property.]

HALLETT, District Judge (charging jury).[8] * * * The plaintiffs claim, by their declaration or complaint, the ground which is within the line of the first incline on the Bull's Eye lode,—that is to say, they claim that the defendants have ousted them from that portion of the lode which lies within the Silver Wave location. * * * You will remember I asked, at the close of the testimony, some of the witnesses to give the distance from the north end of the [Silver Wave] claim to the first and second incline, and to the shaft on the Bull's Eye claim opposite the main incline on the silver wave workings. These distances were given: To the first incline, 45 feet; to the second incline, 135 feet; and to the shaft opposite the Silver Wave workings, 250 feet. Probably the theory of the plaintiffs is that somewhere, at a point between the second incline of the Bull's Eye and the main incline of the Silver Wave, or at the shaft opposite that incline, the lode passes from their ground into that of the defendants; and, as I said before, if you find for the plaintiffs, I think you ought to determine with some degree of certainty what that point is.

Now, you have observed, in general, that the parties here have no controversy as to the surface of the ground. The defendants' location lies parallel with and alongside the plaintiff's location, and immediately east of it. So far as the ground in dispute is concerned, there is no conflict on the surface, but the plaintiffs claim the right to pursue the lode, which they say they have in their own territory, out of their territory and into that the defendants. Upon that the principal question relates to the top and apex of the lode, as to whether it is within the plaintiff's location or in that of the defendants', and as that is the principal point in the case, I have written what I wish to say to you upon that subject as follows:

[8] Parts of the charge are omitted.

Upon the evidence before you it may be assumed that there is a lode in the Silver Wave location, and the principal question for your consideration is to determine the situation of the top and apex of that lode with reference to the two locations. You have observed that the claims are continuous and parallel to each other, the defendants' claim lying immediately east of that owned by the plaintiffs. The act of congress provides that one who locates and acquires title to a vein may follow it to any depth within the end lines of his location, although in its downward course it may enter the land adjoining. And so, also, as to all other veins having their tops within the surface lines of the location extended downward vertically. So that it is often a question whether the top and apex of the lode is in one place or another, as the matter of ownership may turn on that point And that is the main question in this case, for, if the plaintiffs hold the top and apex of the lode in their ground, they may, by the express language of the act of congress before mentioned, follow it from their own territory into that owned by defendants. That proposition may be stated in other language, as, whether the lode is to be found in plaintiffs' ground, and thence extending eastward into defendants' ground, or in defendants' ground only. On that general subject, you have observed that the witnesses concur in saying that the line of contact between the porphyry and lime rock extends more or less definitely into plaintiffs' territory for a distance of about 100 feet. They are not agreed whether the porphyry rock overlying the lime is in massive condition, or in the condition of slide or debris on the surface of the mountain. Nor are they agreed whether the material found between the lime and porphyry is of the country rock or vein matter, and whether it is of value.

It will serve our purpose to put out of view for the moment those points relating to this line of contact in which the witnesses are not agreed, and consider whether, upon the assumption that the line of contact between porphyry and lime extends from plaintiffs' ground into that of defendants', without more; that is to say, without anything of value therein, so far as it is found in plaintiffs' ground, it may be regarded as a lode or vein, within the meaning of the act of congress. And that is easily answered in the negative. For, whatever may be said of true fissures, it must be conceded that the joinder or union of rocks differing in character, or of the same character, is not in itself a lode or vein. And if, in some space between such rocks, there is found material which sometimes or frequently exists with the valuable ore in lodes, the case is not different. As to all such contracts and all such deposits as are found in the neighborhood of Leadville, a lode cannot exist without valuable ore. But, if there is value, the form in which it appears is of no importance, whether it be iron or manganese, carbonate of lead, or something else yielding silver, the result is the same. The law will not distinguish between different kinds and classes of ore, if they have

appreciable value in the metal for which the location was made. Nor is it necessary that the ore shall be of economical value for treatment. It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore. In the case of silver ore the value must be reckoned by ounces, one or more in the ton of ore, and if it comes to that it is enough, other conditions being satisfied, to establish the existence of a lode.

If, therefore, you find, from the evidence, that there is a line of contact between porphyry and lime in plaintiff's ground, extending thence into defendant's ground, and in some space on that line there is a material differing from the enclosing rocks, by whatever name that material may be called, in respect to whether it is a lode or vein, it shall be judged according to its value. And this is true whether the material so found is or is not such as is sometimes or often associated with valuable ore in the deposits in the neighborhood of Leadville, whatever the rule may be as to true fissures what is commonly called "the contact" is not, in the absence of valuable ore, to be regarded as a lode or vein. Nothing will be said in this connection as to what rule shall be applied in the case of interruptions in the ore body, or barren spaces in the contact, when it has been proven to be of value to some extent from the surface. Because, upon the evidence before you, whatever your conclusion may be as to the value of the material in "the contact," you will probably find it to be continuous from a point a little below the surface in the first incline down to that place in defendants' ground from which valuable ore was taken. If, then, you say that the material in what the witnesses call "the contact" throughout plaintiffs' ground is not of appreciable value in silver, within the rule already given, there is no lode or vein in that place, and the law is with the defendants. On that point, however, the evidence is contradictory. And if, on the other hand, you find from the evidence that the material is of value, and that it is continuous from plaintiffs' ground into that owned by defendants, a further question will arise as to whether it is "in place." The act of congress speaks of veins or lodes "in place," by which, according to our interpretation, it is required that the vein or lode shall be in the general mass of the mountain. It may not be on the surface, or covered only by the movable parts called "slide" or "debris." But if it is in the general mass of the mountain, although the enclosing rocks may have sustained fracture and dislocation in the general movement of the country, it is "in place." In this instance, it is claimed by defendants that the porphyry overlying the lime is not in place anywhere in plaintiff's ground, and, if that be true, it cannot be said that the lode is in place, if one exists there. The distinction to be made is whether the porphyry in plaintiffs' ground is part of the general slide and debris of the mountain, or stands in its original position in the structure of that formation. It

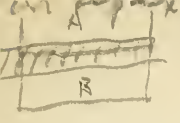
is enough if it is found in place at any point west of plaintiffs' east line, for, in this instance, the lode, if there is one, must come into place with the overlying rock. Upon this explanation, if you are able to say, on the evidence, that there is a lode, and that it is in place in plaintiffs' ground, and that it descends thence into defendants' ground, your verdict should be for the plaintiffs. If there is no lode, or it is not in place in plaintiffs' ground, your verdict should be for the defendants.

So much, gentlemen, as to the principal points. * * *

As to the weight of evidence and the burden of proof, I have been asked to say to you, and I say accordingly, that it is upon the plaintiffs. It is upon them because they are the plaintiffs in the action, and they are required to prove their right of action as against the defendants; and, also, because, in cases of this kind, where one party seeks to go out of his own territory into that claimed by another, the burden is upon him to show his right to do so,—that is to say, he must prove by a preponderance of testimony that he has a lode within his own territory, and that he has the top or apex of it, in order to go out of his own territory, in pursuit of that lode. He cannot, otherwise, claim the right to enter ground, or enter upon the possession of it not within his own location. So that, upon that, the burden is upon the plaintiffs to show to you by preponderance of testimony, if I may so express it, that they have the lode within their own ground, according to the definition which I have given you, and that it proceeds from thence into the ground claimed by the defendants.

A further question, if you find for the plaintiffs, as to the damages to which they are entitled: They have claimed in their complaint and they are entitled to recover if they own the lode, for the ore removed by the defendants in this first incline. You remember what the testimony was upon that subject. You remember the statements made by Mr. Doyle, and about his statement as to the value of the ore removed by the defendants from that incline; and if the plaintiffs are entitled to that ground, they are entitled also to recover the value of that ore.

I do not think of anything more, gentlemen, which it may be important to say to you. The principal question for your consideration is contained in this writing which I will hand to you, and you may take with you to your room.



DUGGAN AND OTHERS v. DAVEY AND OTHERS.

1886. SUPREME COURT OF DAKOTA. 4 Dak. 110, 26 N. W. 887.

CHURCH, J.[9]—This was an action in equity, brought by the plaintiffs, as owners of the Silver Terra mine, to restrain the defendants from prosecuting certain mining operations, by which it was alleged they had already approached and were threatening and intending to enter within, the lines of the plaintiffs' claim, and remove certain valuable bodies or deposits of silver ore therefrom. The complaint alleged ownership by the plaintiffs in fee of the Silver Terra mine, (mineral claim lot No. 364,) and described the same by metes and bounds. It also stated sufficient grounds for equitable relief by way of injunction, and prayed (1) for the usual injunction *pendente lite;* (2) for perpetual injunction at the final hearing; (3) for general relief. A preliminary injunction was granted, and, upon a motion to dissolve, was continued in force.

The answer of the defendants, after denying "each and every allegation of the complaint, except as hereinafter specifically admitted," proceeded to allege with great particularity of detail their ownership and possession of a certain quartz mining claim known as the "Sitting Bull" lode, with all veins, lodes, or ledges of valuable mineral bearing rock in place, throughout their entire depth, having their top or apex within the exterior surface boundaries of said Sitting Bull lode or mining location, under a location made by Donegan and Cochran, grantors of defendants, September 26, 1876: a relocation by Donegan and Cochran, March 16, 1877; an entry for patent by John H. Davey, January 8, 1883; and continuous and uninterrupted possession by defendants and their grantors. The answer further alleged that the discovery on the Sitting Bull lode was made on a vein, lode, or ledge of rock in place, bearing silver; that the top or apex thereof was within the surface lines of said claim, extended downward vertically; that said claim was located along the said vein or lode; that defendants, in working and developing the same, had followed it for a distance of about 600 feet from the top or apex thereof, on a departure from the perpendicular, through and beyond the vertical southerly side line of the Sitting Bull claim, and in so working, developing, and following the same had reached a point on said vein or lode where the same reached or passed through and beyond the vertical northerly side line of the Silver Terra claim; that throughout its entire course, as so worked, developed, and followed by them, the ore body contained in said vein was continuous, without break or interruption, and that the vein, lode, or ledge bearing silver, upon which they (the defendants) were working, as alleged in the complaint, and which is claimed to be the property of the plaintiffs by

[9] Parts of the opinion are omitted.

virtue of their Silver Terra mining claim, is the same vein, lode, or ledge so discovered, worked, developed, and followed by the defendants in and from their said Sitting Bull location; that said vein at the point where they were working the same, as alleged in the complaint, lies between vertical planes drawn downward through the end lines of said Sitting Bull location, continued in their own direction; that the defendants are the owners of said vein, in possession and entitled to possession thereof at said point, and at all points within the Silver Terra claim; that they have the right to follow the same so long as it shall continue to be continuous, and to depart from the perpendicular, and that as such owners they are following the same, and claim the right to do so, within the vertical side lines of the Silver Terra claim, and through and across the same; and that plaintiffs have no right, title, or interest in or to said vein, or any portion thereof, by virtue of their ownership of the Silver Terra claim.

At the time the complaint was filed plaintiffs had entered the Silver Terra for patent. Subsequently a patent was issued to them therefor, and thereafter, by leave of the court, they filed a supplemental complaint, alleging—*First*. The issue of said patent, and that it was based upon a location made by Daniel Egan, April 1, 1881, and claiming relation of title and possession to that date. *Second*. Alleging that defendants were prosecuting their workings under a claim of right so to do as the proprietors of a vein having its top or apex within the Sitting Bull claim, and that said claim and pretense were false, fictitious, and fraudulent, and defendants without right to enter and commit the acts complained of, and that plaintiffs were ignorant of this claim at the time their original complaint was made. Wherefore they prayed that the defendants might be restrained from setting up or asserting any right, title, or interest in or to their said mining ground, or the ores, metals, or minerals contained therein, on account of said alleged vein in said Sitting Bull claim.

For answer to this supplemental complaint the defendants, among other things, denied any knowledge or information as to the issuing of the patent to the plaintiffs; denied that said patent was based upon a location made by Egan, April 1, 1881, or any other time; and alleged that Egan never, at any time, made any valid location of said Silver Terra claim, or any discovery thereon of any vein of quartz or other rock in place, containing valuable mineral; and that the pretenses of Egan and the plaintiffs in this behalf are fraudulent and unfounded. They further reassert, but in more general terms than in their previous answer, their right to prosecute the work of extracting and mining the ore complained of by plaintiffs by virtue of their proprietorship of a vein having its top or apex outside of the lines of that claim, and extending thence on a departure from the perpendicular, in its downward course, to the place where they were working, within the vertical boundaries of the Silver Terra. This

answer also avers that the plaintiffs have no right, title, or interest in said vein, lode, or ledge by patent from the United States, or otherwise, nor any right to the ores contained therein; and prays that it may be adjudged that the defendants are the proprietors of the vein upon which they were working at the commencement of the action herein, and that plaintiffs have no estate, right, title, or interest in or to the same.

The issues presented by these pleadings were tried by the court, without a jury. Fifty-six working days were occupied in the trial, during the course of which 35 witnesses were examined for the plaintiffs and 60 for the defendants, the testimony altogether covering some 7,000 pages. Once during the progress of the trial, and again after the testimony was closed, the presiding judge visited and made a thorough inspection and examination of the premises in controversy, in company with a representative selected by each party. Subsequently the court filed its findings of fact and conclusions of law, adjudging the plaintiffs entitled to the relief demanded, and a final decree was entered in accordance therewith. A motion for a new trial was made and denied, and an appeal was therefrom taken to this court. The record shows 100 assignments of error, which it will be impossible for us to consider in detail. We shall notice only some of the more important involved in the appeal. * * *

It will be observed that there is no controversy respecting the surface of the Silver Terra claim; of that the plaintiffs are in unquestioned possession, and it is unquestionably embraced within their patent. The ore body in controversy is some hundreds of feet below the surface, and has been reached by a tunnel upwards of 600 feet long. Nor are they asserting a right to anything beyond or outside of that segment of the earth which would be included within planes extended vertically downward through the lines of their claim. They are merely resisting an encroachment upon mineral deposits within that segment. Let us consider, therefore, the nature and incidents of the title acquired by possession, location, and patent of mineral lands.

The common-law rule is familiar. The ownership and possession of the soil extended to the center of the earth, and *usque ad cœlum,* and included everything upon its surface and within its bosom. We find that the thing, the substance of which the United States statute treats, is "lands valuable for minerals," and that it is for the disposition of these "lands" that provision is made in chapter 6 of the Revised Statutes. It is the "lands" in which mineral deposits are found which are "open to purchase." It is "land" claimed and located for valuable mineral deposits, which is the subject of application for patent, and where patent of the United States issues, it is for the "land," at so much per acre. The definition of "land" given in our territorial statute is concise: "The solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance." In the absence of anything

in the statute to the contrary, we think it might well be concluded that one becoming the owner or possessor of any of these lands would hold them with and subject to all the incidents of ownership and possession at common law. It should be borne in mind that before the enactment of any statute recognizing and regulating his possessory rights, the mining locator, as between himself and the United States, was technically a mere trespasser upon the public domain; and that even although he might have conformed in his location to the rules and customs adopted in the mining district in which his claim was situated, yet, so far as any legal right existed to hold his claim against a new-comer, that right rested upon possession merely; hence the statute. Rev. St. U. S. § 910.

The government, however, having, in pursuance of its policy of encouraging the discovery and development of its mineral wealth, long tacitly recognized the possession of the miner, has now, by statute, not only given an express license to those establishing their possession in the prescribed method, and provided a way by which the locator may become the owner in fee of the land embraced within the lines of his claim, but has also declared that such locators "shall have the exclusive possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations." [Rev. St. U. S. § 2322.] This statute undoubtedly introduced an important modification of the common-law rule. It gives to the proprietor of a vein a right unknown to the common law,—the right to pursue such vein beyond his own lines, outside of that particular segment of the earth embraced within the lines of his claim extending vertically downward; and it is therefore, to that extent, an enlargement of his common-law right. But, on the other hand, inasmuch as the same right is granted to every locator under the statute, each holds his possession subject to the same right in others, and is therefore liable to have his land entered by an adjoining proprietor pursuing his vein in its course beyond his own side lines; and to this extent, therefore, his common-law possession is abridged.

Two points cannot fail to be noticed in this connection: *First*, that this enlargement of the common-law possessory right is incident only to a claim located in the manner provided by law; and, *second*, that the exercise of such right operates to the abridgement of the possession of every tenement penetrated or intersected by a vein having its top or apex in a superior tenement.

Such I understand to be the effects of the statute. I am unable to see that in any other particular essential to this controversy the

rights of possessors of mineral lands differ from those of other lands. * * *

This brings us to the consideration of the main controversy, the consideration of which will dispose of such of the remaining assignments of error as we think essential. We have already stated that we do not feel called upon in this case to review the findings of fact made by the court below. We shall adopt them as they are. In connection with these findings, and the conclusions of law thereupon, the court also delivered a carefully prepared opinion in writing, which has been sent up with the record to this court; and inasmuch as it states in convenient form the facts and circumstances of the case, and the conclusions to which they lead, and as we agree with those conclusions, we shall adopt that opinion also, or so much of it as is hereinafter quoted, as the basis for our own judgment.

After disposing of some preliminary matters, the district court proceeds as follows: "Coming now to the main questions in the case, which involve the existence, situation, and character of the alleged vein or lode of mineral-bearing rock, the location of defendants' Sitting Bull claim with reference thereto, it is difficult to convey a correct comprehension of the premises without the aid of one or more diagrams, but I will attempt a description which may suffice for the present purpose. Custer hill, upon which these claims are located, is situated in the village of Galena, in Bear Butte mining district, in this county. The village lies at the base of the western slope of the hill, which presents a lateral face from south to north (taken along the line of the outcrop hereafter mentioned) of 1,300 feet,—of course at the base it is somewhat wider. At its northern extremity it turns to the east, and its northern slope presents a lateral face from west to east of upwards of 3,000 feet at least. Along its base, and following it in this turn, in the direction indicated, is a small stream called Bear Butte creek. These slopes are quite steep, and extend from base to summit about 1,200 to 1,300 feet. The whole country is hilly and broken, and this hill is only one of a series of similar elevations with which it is more or less directly connected. Northwardly across Bear Butte valley, or gulch, which is there perhaps 500 feet or more in width, is another hill known in this case as the 'Florence Hill,' whose southern slope extends laterally, from west to east, nearly parallel with Custer hill. Beginning, now, at or near the southern extremity of the western slope of Custer hill, at a point perhaps half way or more up the slope, there is found an outcropping layer or stratum of a reddish quartzite or metamorphic sandstone several feet in thickness, (upwards of ten feet at least,) overlaid by a body or stratum of limestone or dolomitic shale of a thickness not definitely ascertained, but certainly extending several feet above the quartzite. I do not mean to be understood as stating that this is the beginning point of this quartzite stratum; but at or near this place the hill turns to the west, and this is the furthest point

northwardly or westwardly to which attention has been given in the case. From this point the croppings may be readily traced, in several places by high reef-like ledges jutting out boldly from the face of the hill, along the western face to its northern extremity. The general bearing of this line of croppings in the direction indicated is given by Mr. Dickerman, one of the defendants' witnesses, as N. 11 deg. W., the distance as 1,243 feet, and the angle of inclination upwards, from south to north, as 3 deg. 26 min. Mr. White, a witness for plaintiffs, gives the distance as 1,300 feet, and the angle of inclination as somewhat less than that stated. At the northern extremity of the hill this line of outcrop of quartzite, with its overlying limestone or dolomite, turns and extends along the northern slope with a downward inclination, thus gradually nearing the base of the hill, until, at a distance of something over 2,500 feet, (not established by the testimony,) it disappears beneath the bed of the creek.

"There is much conflict of testimony as to whether this last line of outcrop was originally traceable by a natural exposure along the face of the hill, or whether the discoveries on this side were made by following up the quartzite float, or pieces of detached rock, which had rolled down the hill-side, and the edge of the stratum afterwards traced by means of the numerous workings which have since been made there. There is considerable natural exposure towards the eastern end of the line, but the hill-side there is very precipitous and inaccessible. Mr. Frank Davey testifies to a natural exposure of quartzite all along the face of the hill on the line which I have called the line of outcrop; but I do not remember any other witness who testifies positively to this, while numerous witnesses testify that, although they looked for such exposure, they could not find any, at least in the Sitting Bull location; and I think it clearly appears from the testimony of Donegan, the original locator of the Sitting Bull, that he was led to his discovery entirely by float, and found no outcrop at all, except where he and his co-locator exposed it by uncovering the ledge. He says expressly that they found it by finding float down the hill, and followed it up until they couldn't find the float,—there they concluded must be the apex of a vein. It should be mentioned, however, that considerable work was done upon the ledge, by which it was exposed in many places, and a road was cut along the hill-side,—so that what Mr. Davey took for natural exposures may have been portions of the ledge uncovered by work. There is no doubt, however, that whether it came within the strict definition of an outcrop or not,—given by one learned author (Geike) as 'the edges of strata which appear at the surface of the ground,' and by another (Van Cotta) as 'that portion of a vein appearing at the surface,'—the northerly edge of this stratum of quartzite, with its overlaying stratum of limestone, extends in the manner already indicated, on a line at or near the surface, all along

the northerly face of the hill, and would seem to come within the definition given by Dr. Raymond in his glossary: 'The portion of a vein or stratum emerging at the surface, or appearing immediately under the soil and surface *debris*.'

"The general course and direction of this line of outcrop are indicated by Prof. Dickerman, who testifies that from the point on the outcrop already referred to, on the northern extremity of the hill, at the turn, to a point thence distant 1,950 feet, (about 100 feet west of the east end of the Sitting Bull location, hereafter described,) the bearing is N. 70 deg. 30 min. E., and the angle of declination 9 deg. Along the whole line of this outcrop, as thus described, locations of mining claims appear to have been made, which I note here, as they have been referred to in the testimony, mainly for convenience of description and reference. First on the south is the War Eagle location; north of that the Savage; then, on the same face of the hill, the Custer. I believe another location called the 'Highland Chief' embraces some part of this line, but have no reference to it. On the northern slope are, first the Neptune, then the Sitting Bull, and then the McClellan,—all located in an easterly and westerly direction, end to end, along this line of outcrop already described, extending across the northerly face of the hill. More specifically, with reference to the Sitting Bull, that location is situated about midway—east and west—of the northerly face of the hill, and extends from the point of discovery about 690 feet in a direction S. 74 30 W., (reversely N. 74 30 E.,) and from the same point about the same distance N. 89 30 E. The end lines are parallel, having a bearing of S. 35 deg. E. The claim is thus about 1,380 feet long, and is about 300 feet in width. Throughout this length the line of outcrop described is wholly within the side lines of the location, and passes through the end lines very nearly at their middle points. Adjoining the Sitting Bull on the south, and passing up the hill in the order named, are the Tiger Tail, Surplus, Fraction, and Silver Terra locations, all laid substantially parallel with the Sitting Bull. The Tiger Tail is owned or claimed by the defendants; the others by the plaintiffs, or some of them. Adjoining the Tiger Tail and Surplus on the west, and the Sitting Bull on the north, is another claim of the plaintiffs' called the 'Richmond.' For the Silver Terra and Sitting Bull claims the plaintiffs and defendants respectively hold patents of the United States. As already stated, the ledge within the Sitting Bull location has been exposed by numerous excavations, and drifts have been run in various directions in the quartzite, from all of which more or less valuable silver ore has, from time to time, been extracted. The main working tunnel starts at a point near the discovery tunnel, and extends in a generally south-east direction about 700 feet across or through the intervening claims, and a short distance into the ground embraced within the vertically extended lines of the Silver Terra. Branching off from this main tunnel, and, as

Mr. Frank Davey says, in every conceivable direction, are numerous extensive drifts. At the end or face of the main tunnel a large chamber has been excavated, disclosing a body of valuable silver ore, which defendants were engaged in removing when stopped by the injunction issued in this action.

"All these workings are in the quartzite, disclosing throughout pretty much all their extent the overlying stratum of limestone, which forms the roof of the workings, and upon the contact of which with the quartzite the drifts have mainly been run, although in some places this roof has been broken into, and in other places, where the cleavage was imperfect, the quartzite has been left in place. This roof or wall is quite smooth and regular,—remarkably so, is the testimony of several of the more experienced witnesses. The floor of the workings is also in the quartzite, which is thus shown to have a thickness of at least seven feet, and other testimony established a thickness of at least ten feet. Beyond this its extent is uncertain.

"The defendants contend that by their excavations, one on the edge of the ledge outside and two within the workings, a chloritic quartzose shale has been discovered a few feet below the floor, essentially differing from the quartzite, and forming a distinct foot-wall. The plaintiffs deny any essential difference in the rock so disclosed, and claim that other explorations, which are testified to, establish the continuity of the quartzite for an undetermined extent downward, and contend that at all events the limited excavations made by the defendants are not sufficient to establish the existence of a foot-wall, as claimed. The evidence is practically undisputed that throughout its whole extent, so far as disclosed by the workings of the defendants, the quartzite is mineralized or metalized with iron and silver in various forms of deposit; the iron being mostly in the form of an oxide, giving a reddish tinge to the rock, and the silver existing in the form of native silver, sulphurets, chlorides, bromides, ruby silver, and carbonates. These silver ores are found impregnating the quartzite more or less throughout, it being in some places considerably decomposed, and in others retaining its massive appearance, with little or no external indication of richness; but Mr. Davey testifies that among some thousands of assays of this quartzite, taken from time to time from all parts of the workings, he has never found any which did not show an appreciable quantity of silver. Besides the forms of deposit already mentioned, bodies of galena bearing silver are also found distributed in bunches, pockets, and bands or sheets of varying extent throughout the workings, but not in any continuous body. Generally these ore deposits are found to be richest along the contact of the roof, extending three or four feet downward. Sometimes they are found lower down. Occasionally the galena would shoot up in the limestone, then again down to the floor.

"Prof. Dickerman is of the opinion that this galena was brought

up and deposited in a molten condition, and that all the other forms of deposit have proceeded from it by decomposition and impregnation. Mr. Riotte, another expert witness for defendants, and a gentleman of large experience and scientific attainments, is of the opinion that at or about the time of the first metamorphosis of sandstone into quartzite the galena was brought up in solution by means of a hot spring, and that long subsequently the second metamorphosis of the quartzite took place into its present condition, which he says is strictly quartz, and then the other silver ores were brought up and deposited by similar means. Between these two theories I do not feel called upon to decide. I am satisfied that whatever the cause, the result was a continuous impregnation and mineralization of the quartzite with silver throughout, so far as disclosed by the Sitting Bull workings, and extending to the ground in controversy.

"Following the main working tunnel from the point where it passes through the south side line of the Sitting Bull, through the intervening ground, and into the ground in controversy, the floor of the tunnel and the roof in the line of direction of the tunnel have a general downward inclination of about 4 deg.,—greater where it trends to the east, less where the trend is towards the south. Upon the Richmond location, before mentioned, plaintiffs have sunk a shaft, from which at a depth of 100 feet a drift or tunnel has been run by them, extending in a south-easterly direction to where it reaches the vertically extended north line of the Surplus; then turning somewhat more to the east, until it passes the north line of the Silver Terra; and then again turning in a direction very little south of east, until it passes some distance beyond the point where it would be intersected by a continuation of the defendants' main drift,—heading it off, so to speak,—and separated from it at that point by not more than four or five feet of intervening rock. This tunnel, throughout its whole extent of some 800 feet, was run in the quartzite, disclosing and following the overhanging roof of limestone, and encountering several bodies of galena and other pay ore; but although very little testimony was offered on this point, I understand the plaintiffs to say that except where these ores were encountered they did not consider the quartzite rich enough to pay. Incidental mention was also made in the evidence of tunnels run in for short distances on the quartzite from the west on the War Eagle, Savage, and Custer locations. I may add here that, except at the entrance to the drifts, the workings are not timbered,—the rock everywhere being found firm and massive. Of course, pillars are left at proper intervals.

"The facts thus far given are, I believe, mainly uncontradicted, except where otherwise stated. I come now to a consideration of those about which there has been more or less conflict of testimony. Foremost and most important of these is the question as to the direction of the dip or downward course of this stratum of quartzite,

with its overlying limestone. * * * I think it will be sufficiently correct for the purposes of this case, and, indeed, I do not see how any essentially different result can be reached from all the testimony, if we determine that the dip of this stratum of quartzite, with its overlying limestone, is east. The general angle of declination of this stratum, or its departure from the horizontal, I find to be from $7\frac{1}{2}$ to 8 deg. If it were taken from the westerly line of outcrop, a somewhat greater angle would be given; but the evidence seems to show that by some means, probably by the occurrence of a porphyry dike which is found there, the north-east corner of the hill has been slightly tilted up, causing a local variation.

"There was considerable discussion and variety of opinion as to whether the stratum of quartzite outcropping along the southerly face of the Florence hill was to be regarded as having originally formed a continuation of that in the Custer hill, the plaintiffs contending that it corresponds in the conditions of its occurrence and general characteristics, as well as in the inclination downward towards the creek, with the stratum in controversy, while this is denied by some of the defendants' witnesses, especially by Mr. Riotte. From all the testimony on this point, I think it probable that the sedimentary rocks composing both these hills were originally deposited in similar and continuous formation; that by some dynamic process these hills were subsequently elevated to their present positions, and the characteristic conditions of their respective rocks somewhat differentiated; that by the same process of upheaval the waters of Bear Butte creek were directed into a channel having the general direction of its present course; and that by the erosive action of these waters, and the gentler but equally efficient forces of rain and snow and frost, the edges of these strata have been exposed, to be again covered by the gradual accumulation of soil upon the hill-sides. But of these ancient and gigantic processes of nature it becomes us to speak with great diffidence, and I do not deem this point essential to a determination of the case. It is also claimed by defendants that along the northerly face of the hill, and for a width, say, of 50 to 75 feet,—perhaps a little more in some places,—the edge of the strata have been broken up and disintegrated by the action of the elements, and in this condition have yielded to the downward 'slide' of the surface, and have been somewhat bent over, so as to impair the value of observations taken within that region. It is true that the testimony shows the limestone to be much broken up towards the edge, as it naturally would be; but whether it is actually bent over, or to what extent, does not clearly appear, nor do I think it clearly appears that the quartzite has been dislocated by this process. At all events, there are no *data* from which any certain result can be ascertained as due to this circumstance, and I cannot regard it as essentially varying the conclusions reached.

"I pass now to a consideration of the law governing this case, and

the legal inferences to be derived from its application to the facts thus ascertained. Recurring to the proposition laid down in the earlier history of the case, that by their possession, and *a fortiori* by their entry and patent, of the Silver Terra claim, the plaintiffs show themselves entitled to everything within the vertically extended side lines of that claim, including even a body of ore forming part of a vein, lode, or ledge, having its origin or beginning outside of those lines, until some one shall appear to claim it with a better title, as the proprietor of such vein, (it being conceded, as I understand it, that the Silver Terra location was not based upon a discovery of this particular ore body, or of any vein, lode, or ledge of which it formed a part,) and recalling also the conditions under which alone such better title can be made to appear, we inquire:

"*First.* Is the ore body in controversy part of a vein, lode, or ledge of quartz or other rock in place, bearing silver, within the meaning of the statute? Various definitions have been given of 'veins' and 'lodes'. I shall seek no new one, but content myself with stating a few which have received high judicial sanction. Justice HALLETT'S definition is: 'A body of mineral, or mineral-bearing rock, within defined boundaries, in the mass of the mountain.' Judge GODDARD gives this definition: 'Any mineralized belt or zone of rock, lying within boundaries clearly distinguishing it from the neighboring rock, coming from the same source, impressed with the same forms, and appearing to be created by the same process.' This definition was originally given by Justice ——. Justice FIELD gives the same definition, and also the following: 'A continuous bed of mineralized rock, lying within any other well-defined boundaries on the earth's surface, and under it.' And Justice MILLER quotes approvingly all the definitions above given. In the great case of the *Richmond Co.* v. *Eureka Co.*, 103 U. S. 839, tried before Justices FIELD, SAWYER, and HILLYER, the evidence showed a zone or belt of limestone between walls of quartzite and shale. This limestone was much broken up, disintegrated, and fissured, and throughout these fissures ore was deposited in irregular bunches, patches, caverns, and spaces of every variety of form and size, irregularly disseminated through the mass, with a succession of great cavities lying irregularly across the limestone, the whole mass being irregularly impregnated with the ore. This was held to constitute one lode, within the meaning of the law. Dr. Raymond has somewhere defined a 'lode' as that which the miner can follow, expecting to find ore.

"Two of the defendants' witnesses, Messrs. Dickerman and Riotte, gave it as their opinion that the deposits of galena in this mine constituted a vein, within and separate from the lode, and having a downward direction nearly parallel with the end lines of defendants' claim; and it was contended that this constituted a vein which would meet the conditions proposed, and give the defendants the right to follow it into plaintiffs' ground. But I do not find any evidence

which at all satisfies me either as to the continuity of this galena deposit, apart from the lode, or as to its direction. Nor do I perceive how, consistently with the other evidence, it can be claimed that this could be followed and worked separately from the lode. The only evidence of direction that I recall is found in the testimony of Mr. Riotte, who says that he found *striæ* or furrows in the contact; that *striæ* invariably indicate the direction of ore chutes in a vein; and that in any given vein the ore chutes are always parallel; and that in one place in this vein where he found *striæ* he took their direction with a compass, and found it to be a little north of southeast. As to the existence of *striæ,* and their indications, I think he is corroborated to a limited extent by Prof. Dickerman. But besides that, I am not satisfied that Mr. Riotte's theory is one generally accepted by scientists. I am not willing to place a finding upon so slender a basis of facts. No other witness that I remember advanced this view, indeed, Mr. Riotte himself, after giving the same definition of a lode as that of Dr. Raymond, just quoted, and in answer to a question by the court as to whether these chutes of ore or the body of the quartzite would be the lode which would lead the miner on, answered: 'The body of quartzite, decidedly.'

"A somewhat similar theory was advanced by the witnesses of the defendant in the *Eureka-Richmond Case,* though with a different purpose, respecting deposits attempted to be designated as separate veins. But, in the language of the court in that case, 'they are but parts of one greater deposit, which permeates in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone.' Substituting 'quartzite' for 'limestone,' these words are apt and pertinent to the present case. And while I am not entirely satisfied of the existence of the particular foot-wall claimed by the defendants, yet I consider that a stratum of massive rock of this character, overlaid by a solid mass of limestone, and mineralized as this is, comes clearly within the definitions given; and I must therefore find this body of quartzite to be a vein, lode, or ledge of rock in place, bearing silver, within the meaning of the statute.

"*Secondly.* Is the top or apex of this vein or lode within the lines of the Sitting Bull location? The definition of the top or apex of a vein usually given is 'the end or edge of a vein nearest the surface;' and to this definition the defendants insist we must adhere with absolute literal and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances, that is to be considered as the top or apex of the vein. The extent to which this view was carried by the defendants, and, I must confess, its logical results, were exhibited by Prof. Dickerman, their engineer, who, replying to an inquiry as to what would be the apex of a vein cropping out at an angle of 1 deg. from the vertical, on a perpendicular hill-side, and cropping out also at a right angle with that along the level summit of the hill,

stated that in his opinion the whole line of that outcrop, from the bottom clear over the hill as far as it extended, would be the apex of the vein. Some other witnesses had a similar opinion. The definition given is no doubt correct under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases; and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition. It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms 'top' or 'apex,' but it seems in fact to have become somewhat clouded. I apprehend if any intelligent person were asked to point out the top or apex of a house, a spire, a tree, or hill, he would have no difficulty in doing so, and I do not see why the same common sense should not be applied to a vein or lode. Statutory words are to receive their ordinary interpretation, except where shown to have a special meaning; and, as I think the testimony shows that these terms were unknown to miners in their application to veins before the statute, the ordinary rule would seem to apply to them.

"Justice GODDARD, a jurist of experience in mining law, in his charge to the jury in the case of *Iron Silver* v. *Louisville,* defines 'top' or 'apex' as the highest or terminal point of a vein 'where it approaches nearest the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein.' Chief Justice BEATTY, of Nevada, who is mentioned in the report of the public lands commission of 1879-80 as 'one of the ablest jurists who has administered the mining law,' in his letter to that commission says, after defining dip and course of strike: 'The top or apex of any part of a vein is found by following the line of its dip up to the highest point at which vein matter exists in the fissure. According to this definition, the top or apex of a vein is the highest part of a vein along its entire course. If the vein is supposed to be divided into sections by vertical planes, at right angles to the strike, the top or apex of each section is the highest part of the vein between the planes that bound that section; but if the dividing planes are not vertical, or not at right angles to a vein which departs at all from a perpendicular in its downward course, then the highest part of the vein between such planes will not be the top or apex of the section which they include.' Report Pub. Lands Com. 399.

"I am aware that in several adjudged cases, 'top' or 'apex' and 'outcrop' have been treated as synonymous, but never, so far as I am aware, with reference to a case presenting the same features as the present. The word 'apex' ordinarily designates a point, and so considered the apex of a vein is the summit; the highest point in the vein in the ascent along the line of its dip or downward course, and beyond which the vein extends no further, so that it is the end, or, reversely, the beginning, of the vein. The word 'top,' while including 'apex,' may also include a succession of points,—that is, a line,—

so that by the 'top' of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge.

"I have spoken of the 'dip' or 'downward course' of the vein, treating these words as synonymous, and so I think they must be regarded. 'Dip' and 'depth' are of the same origin,—'dip' is the direction or inclination towards the 'depth,'—and it is 'throughout their depth' that veins may be followed, and that is surely their downward course. Mr. Riotte gives us a different definition. He says: 'Starting any line upon the apex of the vein, and running down upon the vein parallel to the end lines, (of the location,) the inclination that line has is the downward course of the vein.' And when asked: 'So that the direction of the end lines of a mining location absolutely fixes the direction of the downward course of the vein?' he replies: 'As far as it interests the man who has located that claim.' Elsewhere he says that, in his view of the law, end lines of locations are, as he expresses it, 'swingable;' so that when the locator determines the direction of his ore chutes he may swing his end lines parallel to them, so as to take them in throughout their depth. A very little reflection will show that, if this be the law, a locator, instead of being limited to 1,500 feet along the vein, could readily place his end lines at such an angle as practically to control nearly 3,000 feet of the vein. With all proper respect for this gentleman's opinion, I cannot accept his views upon this subject at all. I think it clear that the law intended these lines to be laid substantially at right angles to the general course or strike of the vein, since in no other way could the locator be limited to a given length along the ledge.

"This seems to have been the view taken of the law by the three learned judges who sat in the *Richmond-Eureka Case*. It is true that they hold that the provisions of the law of 1872 requiring parallel end lines may be regarded as merely directory, so that a failure to so lay them would not invalidate the location; but I think the whole force of the observations of the court upon this point lies in their assumption that it makes no difference how the miner may choose to locate his end lines, since the law limits his right to that section of the lode or ledge carved out by vertical planes drawn through the extreme points or ends of his line of location at right angles with a line representing the general course or strike of the lode. In this same case, on appeal to the supreme court of the United States, (103 U. S. 844,) the fact is noted that the 'zone,' as it is called, dips at right angles to its course or strike, and that the extension downwards of the compromise line, which was coincident with the end lines of the adjacent claims, followed the dip of the zone.

"I have been led into some digression from the strict line of my argument. Bearing in mind the descriptions heretofore given of the two lines of outcrop on Custer hill, if we might suppose that the outcrop along the northerly face were nearly vertical, I do not see

how it could be seriously contended that such outcrop, under the circumstances, constituted the top or apex of this stratum of quartzite. Such a conclusion could only be reached, it seems to me, by shutting one's eyes to every feature of the case, except the one fact that there was an edge at or near the surface, which was therefore the top or apex of the vein. This I cannot do without such a violation of the ordinary use of words, and, with all the respect and deference which I feel for the opinions of the learned counsel for the defense, I must say without such a transgression of the dictates of a sound common-sense view of the situation, as, in my judgment, the statute does not contemplate. Nor can I see that there would be any difference whatever in the principle were this outcrop to be found at an angle of 45 deg., or, as it is, at an angle of about 8 deg. from the horizontal. I am compelled, therefore, to hold that this outcrop found in the Sitting Bull location is not the top or apex of this vein, lode, or ledge, and that such top or apex is not within that location. I must regard that outcrop as merely an exposure of the edge of the vein on the line of its dip.

"But, *thirdly,* if this is not the top or apex of the vein, then neither is it its longitudinal course. That by the use of the term 'along the vein' the statute requires a location to be made along its longitudinal course or strike I shall not stop to argue. Such, again, was the opinion of the court in the *Eureka-Richmond Case.* But by the term 'strike,' in this connection, I do not mean the technical true strike of the engineer; the line which would be cut by a horizontal plane. Such a requirement would be in many cases impracticable. The supreme court of the United States has said in the *Flagstaff case,* [*Mining Co. v. Tarbet,* 98 U. S. 463,] that 'the most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings;' and I have no disposition, as I should not be at liberty, to disregard the doctrine of that case, so far as it is applicable to the circumstances. In that case a line of outcrop ran up a hill nearly in a westerly direction. A level line run somewhere beneath the surface showed the 'strike' to be north 50 deg. west. The line of the Titus location was not far from midway between these two, and the court held, as against the Flagstaff, which was laid across these lines, that the location of the Titus was a good one, using the language above quoted. There, moreover, the dip of the vein was north-eastward, and no such question arose as that involved in this case. In view of the principles already laid down, I think that the longitudinal course of this zone of quartzite is indicated by the croppings on the west face of the hill, and not by those on the northerly slope.

"After what has been said, it would seem unnecessary to consider whether this vein so far departs from a perpendicular in its course downward as to extend outside the vertically extended side lines of defendants' location, and through the intervening ground to the

ground in controversy,—such could not be the case consistently with the facts already ascertained. It may be conceded as, indeed, a mathematical conclusion from the facts, that by extending drifts from the Sitting Bull location through its vertically extended south side line, in any direction upon the vein east of south, a downward inclination would be found, and that such is the fact with regard to the main working tunnel, which extends to the ground in controversy; but, clearly, this is not what the statute contemplated, and, if I am right in my other conclusions, probably this proposition would not be contested."

We concur in the views thus expressed.

It was unnecessary for the court to determine affirmatively the precise location of the top or apex of the vein in question. The court did find "that the outcrop on the westerly slope of the hill above described was the summit, top, or apex of said zone, ledge, or stratum of quartzite," but did not determine whether or not it was technically the top or apex of the vein. Possibly that might have involved an inquiry as to the continuity of its mineralization to the summit. The question the district court had to determine was whether the top or apex of this vein was or was not within the Sitting Bull location. It determined that it was not, and, as we think, correctly.

The judgment and orders appealed from are affirmed, and the findings and conclusions of the district court are adopted by this court.[10]

TABOR ET AL. v. DEXTER ET AL.

"NEW DISCOVERY" LODE v. "LITTLE CHIEF" LODE.

1878. CIRCUIT COURT, D. COLORADO.
23 Fed. 615, 9 Morr. Min. Rep. 614, Carp. Min. Code, 71.

HALLETT, DISTRICT JUDGE.—This is a bill for an injunction by parties owning the New Discovery lode, in California mining district, against the owners of an adjoining claim called the "Little Chief." It is not alleged that the defendants have entered upon or into the New Discovery ground, or that they have in any way interfered with plaintiffs' possession within the limits of the New Discovery location. The charge is that plaintiffs' lode descends into the Little Chief's ground on its dip, and that defendants are there mining and exhausting the ore. In other words, plaintiffs contend that the top of the lode is in their ground, and that they have the right to follow upon its downward course and through adjoining territory. To maintain this position, it is necessary to show that the lode is in

[10] For diagram and explanation of the case see 1 Lindley on Mines (2 ed.) § 310.

place, within the meaning of section 2320, Rev. St. U. S. And this depends upon the position of the ore or vein matter in the earth, as whether the inclosing mass is fixed and immovable, more than upon the character of the ore itself. Whether the ore is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering than the superficial deposit, which is called alluvium, diluvium, drift, or debris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location. In this bill it is alleged that the overlying material is boulders and gravel, which cannot be in place as required by the act. Not much is known to the court of the deposits on Fryer Hill, but it would seem from the allegations in this bill that they differ materially from the Iron mine, which has a hanging wall as well as a foot wall. For the decision of this motion it is enough to say, that where the mass overlying the ore is a mere drift, or a loose deposit, the ore is not "in place," within the meaning of the act. Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines; but it can not give a right to ore in other territory, although the ore body may extend beyond the lines. The motion will be denied.

GRAND CENTRAL MIN. CO. v. MAMMOTH MIN. CO.

1905. Supreme Court of Utah. 29 Utah 490, 83 Pac. 648.

Action by the Grand Central Mining Company against the Mammoth Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The plaintiff commenced this action on the 9th day of September, 1899, by filing a complaint in trespass, in the first count of which it alleged that the defendant had unlawfully mined, extracted, and removed from beneath the surface of the Silveropolis mining claim ores in quantity exceeding 6,000 tons, of the value of $300,000, and demanded judgment for that sum; and in the second count, after having made similar allegations as to the extraction and value of ores, it asked that the defendant be restrained from further mining operations underneath the surface of that claim, pending the trial of the cause. On October 16, 1899, the defendant filed an answer and counterclaim, alleging affirmatively, inter alia, that the ore bodies in controversy were in a vein which had its apex in the first northern extension of the Mammoth lode, designated as "U. S. Lot No. 38." * * *

On November 20, 1901, the defendant filed its third amended answer and counterclaim. * * * The contention of the defendant

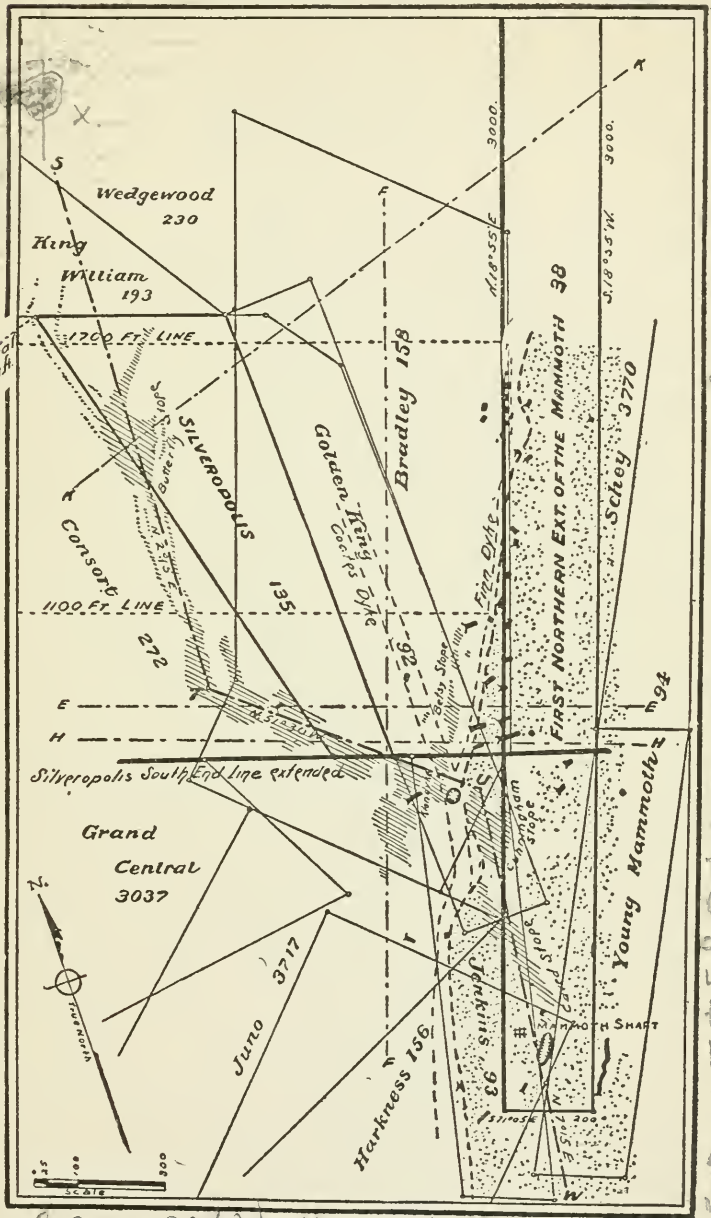
throughout the trial was that the ore bodies in dispute lie in a vein which has its apex in lot 38, and which, on its strike and at its apex crosses the southerly end line of that lot, and continues within its limits to a point at least 1,100 feet north from such end line; while on the part of the plaintiff it was insisted that the vein, which at its apex and on its course crosses the southerly end line of lot 38, wholly departs from the lot at a point 695 feet north from the southwest corner thereof, where it crosses the westerly side line. * * *

Diagram No. 1.

Diagram No. 1, given below, is in part a copy of Defendant's Exhibits A and K and Plaintiff's Exhibit 12, surface maps.

On this diagram are shown, so far as material here, the surface boundaries of the properties owned by the parties. The first northern extension of the Mammoth claim (U. S. lot No. 38), the Jenkins (U. S. lot No. 93), the Golden King (U. S. lot No. 92), the Bradley (U. S. lot No. 158), the Young Mammoth (U. S. lot No. 94), and the Schey mining claims are owned by the defendant; and the Silveropolis (U. S. lot 135), the Consort (U. S. lot No. 272), and the King William mining claims are owned by the plaintiff. The ground in dispute is that part of the Silveropolis and Consort mining claims lying south of the 1,100-foot line. The stipple shading on lot 38, which overlaps the claim, shows the width of the apex and course of the vein as claimed by the defendant. The lines W-U, U-T, and T-S represent the course or strike of the vein as claimed by the plaintiff, and indicate the line of stopping in the mines along the vein, claimed by the defendant to be on its dip, by the plaintiff on its strike. The point U is 695 feet from the southwest corner of lot 38, and is where the plaintiff claims the vein changes from a course N. 15° E. to a course N. 51° 30′ W., true, and departs wholly from the limits of lot 38, continuing in that course to the point T, when it again changes, and thence continues N. about 10° to 15° W. in the direction of the point S. The line K-K indicates a section through the Peterson winze in the Grand Central mine, H-H a section through southern end of Silveropolis claim, E-E a plane about 150 feet north of the south end line of that claim, and F-F a longitudinal projection. Numerous open cuts, made by the defendant for the purposes of this case and claimed by it to expose the apex of the vein, are indicated on lot 38. Tunnels, Mammoth and Grand Central shafts, and other points of more or less importance are also located on the diagram. The 1,100 and 1,700 foot lines and the southerly end line of the Silveropolis mining claim extended likewise appear thereon. Some of the principal stopes are indicated thereon, including the Cunningham of the Mammoth, where the plaintiff insists the vein wholly departs from lot 38, and the Butterfly of the Grand Central. The dykes also appear.

DIAGRAM No 1


Wedgewood
230
King
William
193
1200 Ft. LINE
625 ft. to Grand Central Shaft
SILVEROPOLIS
135
Bradley 158
Consort 272
1100 Ft. LINE
Silveropolis South End line extended
Grand
Central
3037
Juno 3717
Harkness 156
FIRST NORTHERN EXT. OF THE MAMMOTH 38
Schey 3750
Young Mammoth
3000.
S.18°35'W.
N.18°35'E.
SHAFT
SCALE

In determining the rights of the parties to the ore bodies in dispute, lot 38 is of principal importance. That lot or claim was patented May 16, 1873, and all the other claims herein referred to are junior to it as to location and patent. Lot 38 is 200 feet wide and 3,000 feet long, and from its southerly end line its side lines run N. 18° 55′ E., which direction indicates the general course of the apex of the vein, as claimed by the defendant.

Diagram No. 2.

Diagram No. 2 is produced from Defendant's Exhibits B, C, D, F. G. H, and I, and Plaintiff's Exhibits Nos. 1, 2, 3, 6, 7, 8, and 16, maps representing portions of the mines of the parties.

On this diagram each one of the principal stopes, shown by the evidence and material to this decision, is represented and marked with a figure corresponding with the number of the level on which the stope is located. They show where, in the various tunnels and parts of both mines, merchantable ore was found. Those of most importance, in the consideration of the questions before the court, are the Gillespie, Apex, Gulf, Flanders, Burleigh, Naylor, Cunningham, Caved, Klondyke, Betsy, and Butterfly stopes. There are also designated on the diagram tunnels and drifts where no ore was found and no stoping done, being driven into barren ground in search for ore. The Mammoth and Grand Central shafts, the Tranter drift, the drift to the north end line Golden King claim 800 level, the drift connections between the Mammoth and Grand Central mines, east and west cross-cuts, Turner raise, Dago raise, O'Brien winze, Bush winze, the Condon and Golden King tunnels, and other objects, to which reference is made herein, are designated on the diagram, to show, as near as may be, their location and character, and to enable one to judge the more readily of the indications they furnish, as bearing upon the reasonableness or unreasonableness of the theories of either of the parties respecting the strike of the vein or lode, the location of the apex, its width, the dip of the vein westerly, and its continuity and persistency on its dip downward to the ore bodies in controversy. * * *

DIAGRAM No 2

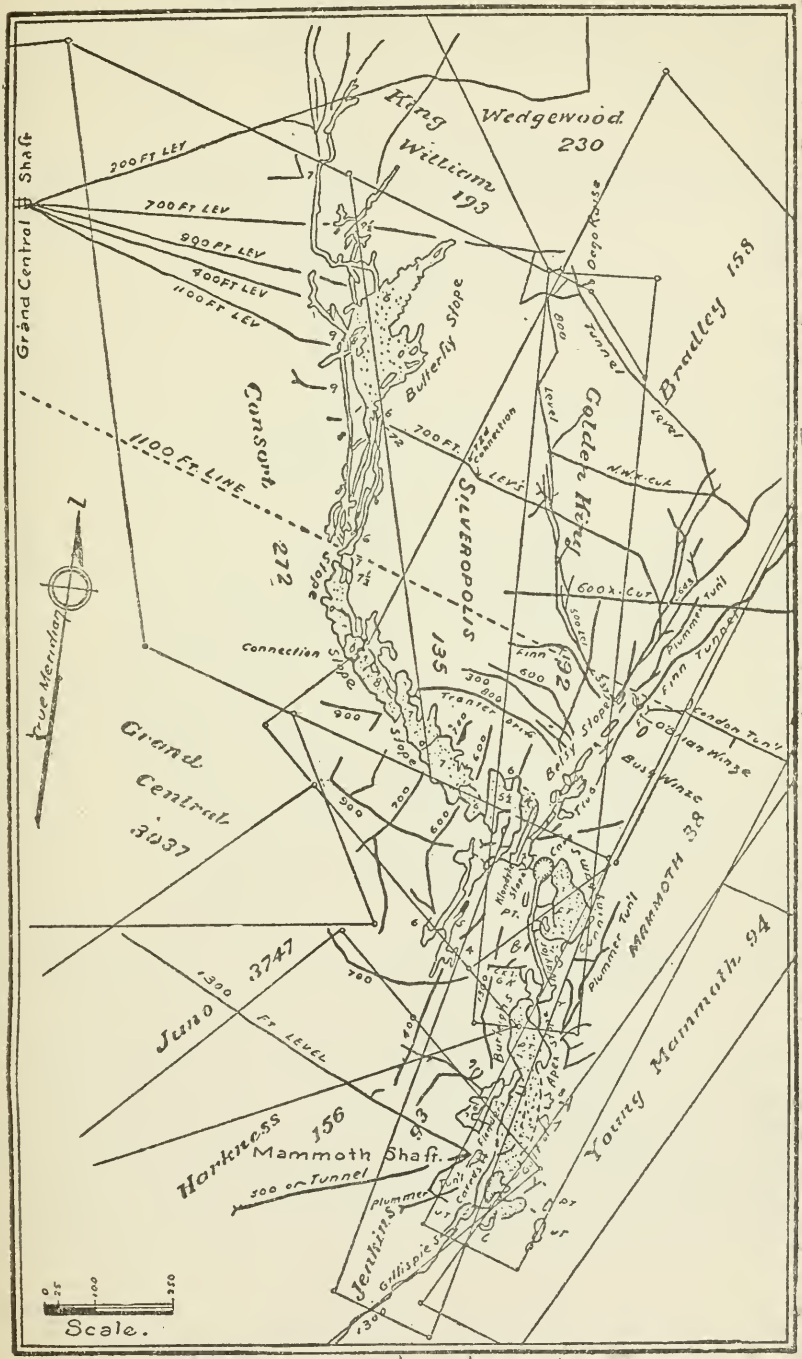
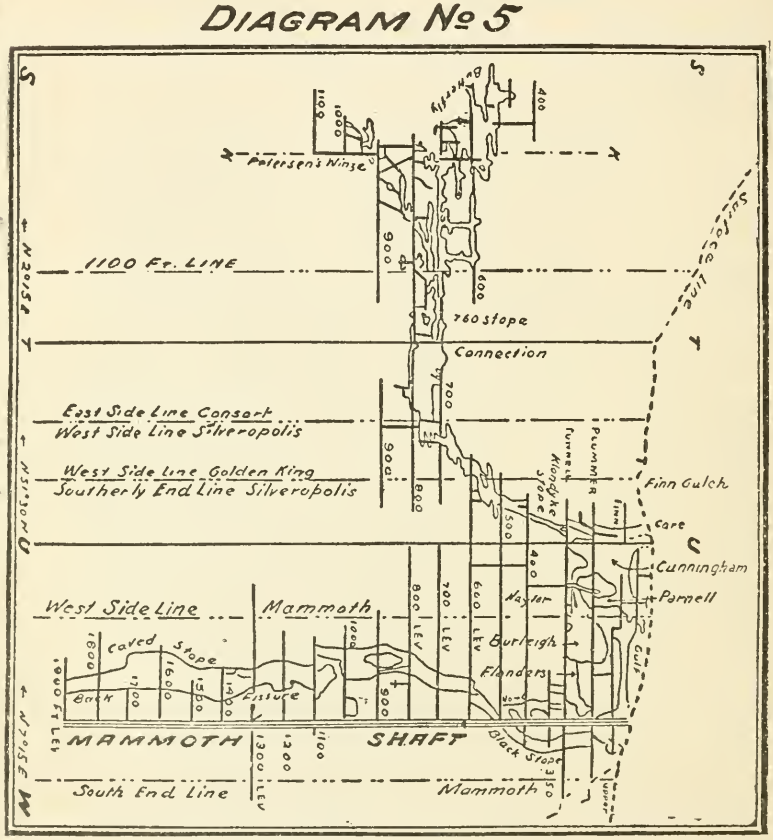

Grand Central Shaft
200 FT LEV
700 FT LEV
900 FT LEV
1100 FT LEV
1100 FT. LINE
True Meridian
Grand Central 3137
King William 193
Wedgewood 230
Bradley 158
Consort 272
Butterfly Slope
Connection Slope
Sylvanoddon 151
Gold Hill 132
Trenton Drift
Plummer Tunl
Finn Tunnel
London Tunnel
Bush Winze
Mammoth 38
Young Mammoth 94
Jessie 3747
Harkness 156
Mammoth Shaft.
300 or Tunnel
Jenkins
Gillispie
Scale.

Diagram No. 5.

Diagram No. 5 is produced from Plaintiff's Exhibits 17 and 26, maps of projections on line of stoping in both Mammoth and Grand Central mines.



This diagram represents projections of the mines of both parties. The contour of the surface along the line of projection, the different levels of the Mammoth mine down to the 1,900 and of the Grand Central to the 1,100, the different stopes, and line of stoping showing the line of greatest mineralization, are all indicated on this diagram. It presents a comprehensive view of the development and explorations of these vast properties. The plane W-U, extends from the southerly end line of lot 38, on a course N. 7° 15′ E., true, and the projection presents a longitudinal section of the vein, on its strike

and dip, within the limits of lot 38 to the point U, to which point the defendant is admittedly the owner of the vein. This section shows the "east or back fissure," on its dip to the deep to be almost vertical. Here the apex of the vein is also admittedly within the limits of lot 38. The plane U-T extends from the point U, near the west side line of lot 38, where the plaintiff claims the vein departs from that lot, on a course N. 51° 30′ W., true, to the point T. The plaintiff insists that the projection on this plane exposes the vein on its strike and dip, while the defendant contends that its dip only is exposed, and that the apex is still within lot 38, and its strike parallel with the side lines of that lot. The contentions of the parties are the same as to the projection on the plane T-S, the course of which plane is N. 2° 15′ E., true. The dispute as to these two projections is as to whether they expose the ore bodies on the strike or on the dip of the vein. * * *

The case was thus submitted to the court and jury with evidence relating to all parts of the properties, surface and underground, in the greatest detail, and, the jury returning a verdict upon the special issues in favor of the plaintiff, the court adopted the verdict, and found, agreeably with it, that the top or apex of the vein continued, from the southerly end line of the first northern extension of the Mammoth, lot 38, to the place where the Cunningham stope at its northerly edge or end crossed in its northwesterly course the west side line of that lot, such point or place being, as found, 690 feet north of such southerly end line, and 90 feet south of the southerly end line of the Silveropolis mining claim, extended easterly in its own direction across lot 38; that at that point the vein on its strike and at its apex wholly departs from lot 38, and does not continue within that lot between the planes drawn through the Silveropolis southerly end line so extended and the 1,100-foot line; that such apex does not continue north of such end line within the limits of lot 38; that between such planes, on that end line so extended and on the 1,100-foot line, there is no apex or part of an apex of any vein, lode, or ledge, which vein, lode, or ledge on its dip extends to and includes the ore bodies known to exist beneath the surface of the Silveropolis and Consort Mining claims, between those planes; and that the apex of the vein or lode which is in the south end of lot 38 does not continue in that lot north of the Silveropolis south end line extended. The decree is in harmony with these findings, and directs that the defendant's counterclaim be dismissed.

Notwithstanding this decision, which was substantially the same as that at the previous trial, the judge filed, separate and apart from the findings and decree, a written opinion, in which he concluded that there are two veins in the Mammoth ground; the one running from the shaft north at least to the 1,700-foot line, and the other lying to the east. In this opinion he argued that the ore bodies in controversy belonged to a vein which had its apex in the Golden

King and Bradley mining claims, and could be recovered by the defendant in a proper proceeding. Thereafter the defendant asked leave to amend its counterclaim, and later to file an original counterclaim, in accordance with the expressed views of the court. These requests being refused, the defendant prosecuted its appeal.

This record presents two principal questions for determination: First. Whether the court erred in finding that the vein mentioned in the counterclaim upon which the trial was had, at its apex and on its strike, leaves lot 38 at a point 690 feet north of the south end line of that lot. Second. Whether the court erred in refusing to permit the defendant to file the amendment to its counterclaim, and in refusing to permit the filing of its proposed original counterclaim, in each of which it was alleged that the vein found at the south end of lot 38 did, at its apex and on its strike, wholly depart from that lot at the point found by the court, and that its apex beyond that point was in the Golden King and Bradley mining claims. All other questions presented are subordinate to and in support of one or the other of these two.

Bartch, C. J.[11]—The main question, which resulted from the issues raised by the pleadings that formed the basis of inquiry and submission at the trial and which we will consider in the first instance, is whether the court erred in finding that the vein or lode mentioned in those pleadings, at its apex and on its north-westerly course or strike, crosses the western side line of lot 38 and wholly departs from that lot at a point 690 feet north of its south end line, and north of that point does not continue, either at its apex or on its strike to or beyond the 1,100-foot line within the limits of lot 38, and that there is no vein or lode having an apex or any part thereof within the limits of lot 38 north of the southerly end line of the Silveropolis mining claim extended eastward in its own direction, and south of the 1,100-foot line, which on its dip extends to and includes any of the ore bodies existing underneath the surface of the Silveropolis and Consort mining claims south of the 1,100-foot line. This is principally a question of fact, and must be considered in view of the law of Congress respecting extralateral rights. * * * The premises are of very great value. It would be idle to say that upon the result of the case made by the counterclaim and answer depends but the ownership of the ore bodies in the Silveropolis and Consort mining claims south of the 1,100-foot line. It is plain to be seen, without demonstration, that, if the ore bodies in dispute herein are embraced in a vein having its apex in lot 38 north of the Silveropolis south end line extended, the ore bodies north of the 1,100-foot line in the same claims are parts of and belong to the same vein. The ultimate question involved is therefore not merely the ownership of a few ore bodies of the alleged value of $300,000, but of the owner-

[11] Parts of the statement of facts and of the opinion are omitted.

ship of ore bodies or of a vein of ore doubtless worth several millions of dollars. * * *

In determining this question the surface of lot 38, the extralateral rights of that lot, the dip and strike of the vein, and the underground workings of the mines are important factors. The extralateral rights, upon which the appellant has founded its claim to the ore bodies in dispute, accrued to it as owner of lot 38 by virtue of the provisions of section 2322 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1425], whereby the owner of a mining claim has a right to follow, between vertical planes drawn downward through the end lines of the location, a vein having its apex within the limits of such claim on its dip to the deep, although such vein may so far depart from a perpendicular in its course downward as to extend outside of the vertical side lines of the surface location. The ore bodies in controversy, however, being located without the limits of lot 38, and underneath the surface of the Silveropolis and Consort mining claims, the appellant, notwithstanding the law of Congress, is met at the very threshold with the presumption that they belong to the respondent, the owner of those claims. Where a person, natural or artificial, owns a patented mining claim, although the statute reserves the right to locators of other mining claims to follow their veins under its surface and extract ore, he is presumed to own all the ore within planes drawn vertically downward to the deep through the boundary lines of such claim, as well as the surface and everything else appurtenant to the claim; and such presumption continues until some other locator or owner establishes the fact that he is entitled to exercise the reserved rights by virtue of the statute. "Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere." Leadville Min. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380; Con. Wyo. Gold Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540; Doe v. Waterloo Min. Co. (C. C.) 54 Fed. 935; 1 Snyder on Mines, §§ 766, 783, 789.

To overthrow this presumption and establish its right to enter its neighbor's ground to extract ore, the burden of proof was upon the defendant, and it was incumbent upon it to show, by a preponderance of the evidence, not only that the apex and strike of the vein were in lot 38, north of the south end line of the Silveropolis mining claim extended, and to the 1,100-foot line, but also to show that, between planes drawn vertically downward through that end line and

the 1,100-foot line, the vein from its apex on its dip was continuous; that its continuity extended to and through respondent's ground; and that the ore bodies in question formed a part of the vein. In other words, the burden was upon the appellant to show by a preponderance of the evidence whatever was necessary to bring it within the terms of the statute, in order to entitle it to the disputed ore bodies, or to justify it in the extraction of ore from its neighbor's ground. Doe v. Waterloo Min. Co., supra; Leadville Min. Co. v. Fitzgerald, supra; Penn. Con. Min. Co. v. G. V. Expel. Co. (C. C.) 117 Fed. 509; Con. Wyo. Gold Min. Co. v. Champion Min. Co., supra; Mining Co. v. Campbell, 17 Colo. 267, 29 Pac. 513.

We concede, as claimed by the appellant, that a patent to a mining claim raises a conclusive presumption that there is the apex of a vein within the patented ground (1 Lindley on Mines, § 305); but there is no presumption that it is the apex of the vein in dispute, and such presumption applies equally to the Silveropolis and Consort mining claims as to lot 38, and does not shift the burden of proof in this case as to the apex and continuity of the vein and ore in controversy. The appellant, however, insists that the evidence clearly establishes that the apex and strike of the disputed vein do in fact continue in lot 38 to and beyond the 1,100-foot line, that the vein is persistent in its continuity on its dip to the ore bodies in question, that such ore bodies constitute a part of the vein, and that the court erred in its findings, inter alia, that the vein, at its apex and on its strike, wholly departed from lot 38 at the point designated, on a northwest course, because, as is claimed, the evidence is insufficient to sustain such findings. In reply to this contention, the respondent insists that as to whether the vein, claimed to include the ore bodies, at its apex and on its strike continues in lot 38 to and beyond the 1,100-foot line, or whether it departs wholly from that lot, on its strike, at the point found by the court, the evidence is conflicting, and invokes the rule, long firmly established within this jurisdiction, that where in a case in equity there is a substantial conflict in the evidence this court will not disturb the findings, unless they are so manifestly erroneous as to demonstrate some oversight or mistake which affects the substantial rights of the appellant. The appellant, however, claims there is no such conflict in the evidence as to warrant the application of the rule in this instance; that the disagreement is not as to the physical facts, but in conclusions drawn from those facts, by the various witnesses, as to what kind of mineral or earthy matter constitutes an apex. Whether the conflict in the testimony of the witnesses relates to their conclusions alone, or to their conclusions and physical facts, or whether it amounts merely to a difference in the opinions of witnesses as to meaning of words—the meaning of "apex" or definition of "vein"—must, so far as possible, be ascertained by reference to the evidence.

Respecting the geological features of the country in which the properties are located, there is practically no conflict. It is shown

that the mines are found in a lime belt which covers about two square miles, and is the great producing area of the Tintic district. In some places the limestone beds are upturned, large areas tilted upon edge, the beds dipping nearly vertically down; while in other places they dip at lower angles, and in special areas the dips are quite uniform; and again, though, it seems, not frequently, anticlinals exist. This limestone is surrounded on all sides, except the north, by igneous rocks. The sedimentary rocks are broken up and fractured, evidently the result of igneous intrusion. The limestone carries some iron, the different forms of iron oxide, also some manganese, and in places the limestone is crushed, crumbled, and brecciated. How these beds of organic sediment were dislocated, bent, and upturned is not free from doubt. Maybe, and most likely, these things were accomplished by some kind of volcanic action, which igneous intrusion indicates, and much fracturing may have been caused by internal shrinkage through nature's cooling processes. Whatever the cause, the disturbance is apparent from the evidence. The surface of the limestone area, wherever exposed, is marked with innumerable seams, cracks, and small fissures filled with carbonate of lime, stained more or less with iron, and sometimes manganese. Quartz, spar, and other materials, characteristic, in general, of mineral-bearing limestone areas, are present, and in places the surface material is brecciated and recemented. A trace of mineral, of one or more of the precious metals, and, in places, more than a trace, even where there is no known vein, seems also to be a characteristic of that line belt. * * *

An examination of the evidence discloses the fact that the witnesses on one side differ widely from those on the other in their statements respecting an apex at the surface in lot 38 north of the Cunningham stope, and in numerous instances as to facts and appearances. Such examination shows not merely a conflict, but that the question whether or not the surface, north of the point mentioned, discloses an apex of a vein in that lot, is answered in the negative by a preponderance of the proof on the subject. It is quite clear that the findings of the court have strong support in the testimony relating to the surface.

Do, then, the underground workings and explorations reveal the existence of a vein, which has an apex within the limits of lot 38, from the Silveropolis south end line extended north to the 1,100-foot line or beyond, and which on its dip extends to and embraces the ore bodies in dispute? Or does the vein, which, as found by the court and admitted by the parties, crosses the south end line of lot 38 and continues northerly, within the limits of that lot, to a point 690 feet from that end line, continue thence northerly parallel with the western side line of that lot, or at that point change its course or strike to and thence continue in a northwesterly course in the direction of the lines U-T and T-S, and embrance on its dip those ore bodies? * * *

In addition to the great mass of testimony of both parties respecting the underground explorations in these mines, it is shown that very numerous samples were taken from the material found in the drifts, cross-cuts, and workings, on the various levels, north of the Silveropolis south end line extended; but, excepting those from the vicinity of the back fissure and the line of stoping or ore channel, the assays in evidence, like those from the surface samples, indicate no mineralization not common generally throughout that limestone area. The evidence on both sides relating to the surface and to the underground explorations, to which reference has been made, is deemed to fairly show the conditions and geological facts of those portions of the properties which will be affected, either directly or consequentially by this decision, and also of those portions, not affected by the result hereof, which have an important bearing upon what is involved. There is a mass of testimony, however, relating to ground and objects of some importance, which has been given due consideration, but to which specific reference is impracticable.

It is apparent from the testimony referred to, as well as from all the evidence, that there is, to say the least, some conflict, not only as to the conclusions of the witnesses drawn from the physical facts, but as to the facts themselves—as to what things actually exist and may be seen upon the surface and in the mines. * * * Nor is it surprising that conflict exists. It is a usual feature in such a suit—of such ordinary occurrence, and so often of such grave character, that the advisability of trying a mining suit before a jury may be doubted. Nor can it be attributed wholly to partizan zeal or personal interest. The high character of the witnesses, in general, in this case forbids this. * * * Every one who has ever attempted to trace, either by surface indications or underground workings, or both, a vein through an eruptive country, or, as here, through sedimentary beds, broken and tilted, with fractures running in every conceivable direction, where anticlines and synclines exist, and the regular dip of the formation in places is obliterated, knows that the investigation is not only laborious, of slow progress, and attended with innumerable difficulties, but is liable, in the end, to be attended, even among the most candid, with antagonistic theories, erroneous conclusions, doubt, and uncertainty. This is strikingly illustrated, in this case, in the fact that for more than a quarter of a century the Mammoth mine was operated by experienced miners, vast amounts of ore extracted from the vein in the southerly end of lot 38, the mountain to the north perforated with expensive, but profitless drifts, along and through the dyke, and cross-cuts to the east and west, and yet it could not have occurred to the operators, from the indications and physical facts disclosed by the operations, during all those years, that the vein had, between the 300 and 400 levels, split and the major portion passed through the dyke on its dip to the west; for, so far as shown by the record,

no attempt was ever made to follow that alleged western portion of the vein on the inclination, or to trace it in the direction of the ore bodies in dispute, or into the disputed territory, until after those ore bodies were struck in the Grand Central ground by the respondent in 1897, although the Mammoth shaft had been sunk hundreds of feet below those ore bodies; and even now, as we have seen from the review of the evidence, with drifts and cross-cuts, on different levels, extended and driven, the surface of lot 38 dotted with open cuts and exposures, as appears from the diagrams and testimony, all for the purposes of this trial, not only the appellant's operators and miners, but its experts appear to be unable to trace or locate the hanging and foot walls of the vein, either at the surface or at depth. Under such circumstances, it need not be marveled that the witnesses, looking at the same things and same characteristic features, did not see them alike, or draw the same conclusions from them.

Suppose, however, notwithstanding there is a conflict in the evidence, we assume, without deciding, that such conflict relates, as is insisted by the appellant, only to the opinions of witnesses as to what the physical facts show, and that the rule, invoked by the respondent, should not, under the circumstances, be enforced, the question then is, was the court justified, under the evidence, in holding that the vein departed, at the point designated in the findings, from lot 38 on a northwesterly course, and did not return to that claim north of that point? In determining this question it becomes important to consider the nature and principal characteristics of this vein, and, in connection therewith, some prominent geological features disclosed by the evidence. Before doing this, it will be well to notice that the appellant contends that the vein consists of a series of parallel fissures in limestone, the ore being mixed up with broken, shattered rock; that the vein is so constituted both at the surface and at depth; and that the limits of the vein are coextensive with the limits of the broken, crushed, seamed, and fissured limestone. Upon this theory it is insisted that, while the broken, stained, and shattered material carries little of the valuable metals on and near the surface, it is vein matter and evidence of vein, and that the court erred in charging the jury that the apex of a fissure vein is the highest point at which vein matter is found, and "by vein matter in this connection I mean rock or earth containing mineral in quantities appreciably greater than is found in the general mass of the mountain." Whether or not this instruction is erroneous we need not stop to determine. This being a cause in equity, the verdict of the jury upon the controverted questions of fact submitted to it was but advisory to the court, and therefore error could not be predicated upon instructions given or refused. The judge had the undoubted right to disregard the verdict or special findings, or consider them in whole or in part, or determine for himself the special issues submitted, as he chose. * * *

In determining the question before us, however, whether the finding of the court was warranted by the evidence, it is important to consider what constitutes a vein or lode. It will hardly be contended that, merely because rock is broken, crushed, shattered, and even fissured, it constitutes a vein within the meaning of the laws of Congress. All miners of any experience, as well as men of scientific research, know that such occurrences may be found in the most barren country. Something more is necessary to dignify that kind of material with the character of a vein or lode. The material, whatever else may be its condition, must be metalliferous—must contain some kind of mineral of value, so as to distinguish it from the country rock; and especially is this true where there are no well-defined walls. This is so in the case of a contact, as well as of a fissure. Where it is barren for a considerable distance, barren in its continuity, it is deprived of the character of a vein. But wherever a vein has at any time existed, with continuity of ore which by some subsequent convulsion or volcanic action may have been interrupted, the character of the vein or deposit is not changed. Stevens v. Williams, 1 Mor. Min. Rep. 557. Fissure veins have many characteristics. They are the fillings of fissures or openings of the country rock, of all kinds of rock of all ages, contain different kinds of material, in some respects corresponding with, in others differing from, the country rock; the most common material being quartz. The fissures have selvages and slickensides, and the gangue material is generally easily distinguished from the country rock. Fissure veins are simple or banded, according to structure as to minerals. Some continue in the same direction; others are irregular and change their courses. Some have a continuity of ore, while others are barren in places, and still others are faulted. The appellant, as we have seen from the testimony, claims the vein in dispute is continuous in the same direction; the respondent, that it changes its course and is faulted. The books tell us that vein-making fissures have been formed, by contraction on drying, as in argillaceous stratum, or on cooling from fusion, or from heat attending metamorphism; by subterranean movements, pre-eminently those which have attended mountain making; by the disruptive or expansive action of vapors resulting from volcanic action; and by corroding vapors, or by solutions from the deep, which sometimes enlarge the fissure, especially where the rock is limestone. Dana, Manual of Geology. Fissures formed through volcanic action, and enlarged by corroding solutions and vapors, are deep-seated, and frequently contain large cavities. That the vein in question was so formed by such action and solutions or vapors appears from the testimony, as we have already observed. It will be perceived that to define the word "vein," that represents a thing of so many and varied characteristics, is a matter attended with difficulty. Especially is this true if such definition, in view of the statutes which deal with min-

eral-bearing veins only, is to convey an accurate idea of the thing itself.

Mr. Justice Field, in the Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548, said: "It is difficult to give any definition of the term, as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." In Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712, the Supreme Court of the United States adopted a definition of vein given by Mr. Justice Hallett in the same case, as follows: "To determine whether a lode or vein exists, it is necessary to define those terms; and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein." So, in United States v. Iron Silver Min. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571, Mr. Justice Field said: "By 'veins or lodes,' as here used, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of mineral in rock." Cheesman v. Shreeve (C. C.) 40 Fed. 787; Hyman v. Wheeler (C. C.) 29 Fed. 347; Leadville Min. Co. v. Fitzgerald, 4 Mor. Min. Rep. 380.

In all these definitions, as will be noticed, the essential elements of a vein are mineral or mineral-bearing rock and boundaries, and no doubt that, when one of these elements is well established, "very slight evidence may be accepted as to the existence of the other."

It would seem, therefore, that where one claims extralateral rights under the acts of Congress, because of a vein existing and apexing in his ground, but which has no well-defined boundaries, he, when his claim is controverted, must, in order to exercise such rights, show a ledge or body of mineral or mineral-bearing rock of such value as will distinguish it from the country rock, or from the general mass of the mountain. The material must in texture and value be such as to show the existence of a vein, and the mere fact, as has been stated, or proof of the fact, that the rock is broken, shattered, and fissured, and mixed with calcareous substance, though it may show a conglomerate mass, does not establish, in the sense of the statutes, a vein. When, however, the walls or boundaries are well-defined, the vein differentiated from the adjacent country, and the kind of material mentioned constitutes the filling, evidence of slight value in mineral will, it seems, be sufficient.

It is insisted for the appellant, however, that "a lode, within the meaning of the statute, is whatever the miner can follow with a reasonable expectation of finding ore"; that, though he sees no ore, yet, if he sees gangue and vein matter, he discovers the lode; and that whatever material would be sufficient to render valid a location thereon would be sufficient evidence of apex to justify one in following therefrom downwards, beyond the side lines of the location, in the same kind of material, to and beneath the surface of his neighbor's property. We do not thus interpret the law. What may constitute a sufficient discovery to warrant a location of a claim may be wholly inadequate to justify the locator in claiming or exercising any rights reserved by the statutes. What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex, to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner. The question of a sufficient discovery of a vein, or of the validity of a notice of location, upon which the cases cited by the appellant on this point are authority, is substantially different from one relating to the continuity of a vein on its dip from the apex, and which tests the rights of the undisputed owner of the surface to what lies underneath and within his own boundaries. It is the object and policy of the law to encourage the prospector and miner in their efforts to discover the hidden treasures of the mountains, and therefore, as between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what prima facie belongs to his neighbor, because of an apex in the claimant's location, a more rigid rule of construction against the claimant prevails, and, as we have already observed, he has the burden to show, not merely that the vein on its dip may include the ore bodies in the adjoining ground, but that in fact it does so include them. Until he establishes such fact beyond reasonable controversy, he has no rights outside his side lines in

another's ground. "In determining what constitutes such a discovery as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the definition of the terms 'lode' or 'vein,' that the tendency of the courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode or within the same surface boundaries, and toward strict rules of interpretation when the miner asserts rights in property which either prima facie belongs to some one else or is claimed under laws other than those providing for the disposition of mineral lands, in which latter case the relative value of the tract is a matter directly in issue. The reason for this is obvious. In the case where two miners assert rights based upon separate alleged discoveries on the same vein, neither is hampered with presumptions arising from a prior grant of the tract, to overcome which strict proof is required. In applying a liberal rule to one class of cases and a rigid rule to another, the courts justify their action upon the theory that the object of each section of the Revised Statutes, and the whole policy of the entire law, should not be overlooked." 1 Lindley on Mines (2d Ed.) § 336. The Supreme Court of Montana, in Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, 52 Am. St. Rep. 665, observed: "When it is said that a location may be sustained by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in the expectation of finding ore sufficiently valuable to work, it is a very different question from telling a jury that the geological fact of the continuity of the vein to a certain point may be determined by what a practical miner might do in looking for some hoped-for continuity. Migeon v. Mont. Cent. Ry. Co., 77 Fed. 249, 23 C. C. A. 156; Bonner v. Meikle (C. C.) 82 Fed. 697; United States v. Iron Silver Min. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571.

Reverting to the characteristic of a vein or lode, appearing from the definitions above quoted, that its filling must consist of a body of mineral or mineral-bearing rock, what value such material should contain is a matter not devoid of difficulty, and no standard of value applicable to all such cases has yet, and probably never will be, devised. It must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself. If the country rock, or the general mass of the mountain outside of the limits of the vein, is wholly barren, slight values of the vein material, as before stated, would seem to satisfy the law; but if, on the other hand, the rock of the district generally carries values, then undoubtedly the values in the vein material, where the boundaries of the vein are not well or not at all defined, either on the surface or at depth, should be in excess of those of the country rock, else there can be no line of demarkation, nor, where the rock is generally broken, shattered, and fissured, any-

thing to separate it from the adjacent country. Values, therefore, of the filling of a vein, must be considered with special reference to the district where the vein or lode is found. It is likewise as to a definition of a vein or lode. In Migeon v. Montana Cent. Ry. Co., 77 Fed 249, 23 C. C. A. 156, it was said: "The definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found." Bonner v. Meikle, supra. Now, weighing and considering the evidence, which we have already examined, in the light of the foregoing definitions, adopted and announced by the most eminent tribunal in this country, and bearing in mind the characteristics of a vein to which we have adverted, the conclusion seems inevitable that no vein that will satisfy the demands of the law has been shown to exist north of the north end of the Cunningham stope, or north of the Silveropolis south end line extended, within the limits of lot 38, which from its apex on its dip extends to and includes the ore bodies in question.

Looking again at the surface of lot 38, through the evidence, we see, it is true, outside the dykes, broken, shattered, and fractured rocks, seams filled with calcite, or calcerous matter, in places brecciated material, and stains of different oxides of iron and occasionally of manganese; but what we conceive to be a decided preponderance of the evidence shows that these same conditions of the rock and earth appear in the same manner and to about the same extent throughout the limestone area north of that end line, except in the vicinity of the line of stoping and of the dykes. The evidence respecting the surface, considered all together, conveys the idea that generally the portion of the country referred to, including lot 38 north of the Cunningham stope, presents substantially the same appearance, except in the vicinity of the dykes, the back fissure, and ore bodies, and that wherever the rock is exposed, by erosion or otherwise, its broken, fractured, and seamed condition is visible. So, as we have seen from the review of the evidence, the same similarity of appearances and conditions of rock and material exists beneath the surface on the various levels in both mines. In fact, we feel warranted in the conclusion that it is established by the overwhelming weight of the evidence that the easterly portion of the Condon tunnel; the northerly portion of the Finn tunnel level, including both of its westerly branches; the Grand Central 200 level, from its easterly face back to station T; the northerly portion of the Mammoth tunnel level, including the three westerly or northwesterly branches and the Dago raises; the branch westerly from station 106 on the Mammoth 400, and the Grand Central 400 level from its easterly face back to the winze; the workings on the 500 level from about station 584 north; the northerly workings on the Mammoth 600 level, including the east and west cross-cut from station 643, and the new cross-cut running westerly from station 15 into Silveropolis

ground; the northerly portion of the Mammoth 700 level, including the long connecting cross-cut, and the Grand Central 700 from its easterly face back to station 22; and the Tranter drift and northerly workings on the Mammoth 800 level—are all outside of any vein such as the law contemplates, but are in country rock, except instances where such workings run along or cross the dykes and are in dyke material. According to the decided preponderance of the evidence, therefore, even though whatever conflict therein exists be regarded as relating to the opinion of witnesses merely, the section of country lying west of the west side line, or, rather, west of the east side line, of lot 38, and north of the ore bodies cut by the plane H-H, or lying along a plane drawn vertically down through the line U-T, or north of the plane E-E and east of the stopping along and in the direction of the line T-S, is practically barren of mineral, although the rock, in general, is much broken, shattered, and fractured, with fissures running in all directions. The same barren condition of that section of ground also appears from the assays of the samples taken from the surface and the workings at depth.

It is true, the appellant claims the open cuts and the workings at depth are substantially all in vein material; but, as we have seen, in the judgment of the appellant's witnesses, broken, shattered, and fissured limestone, or crushed and brecciated matter, no matter how barren, constitutes vein material, although such matter and conditions exist, without any defined boundaries, many hundreds of feet to the east and west of lot 38, in fact throughout that limestone area, so far as it was examined by witnesses, and with no more mineralization than is contained in the general mass of the mountain for more than 1,000 feet to the east and west, or through the limestone belt. Is it not difficult to perceive how such material, in the absence of both a hanging and foot wall, can be regarded as a vein? Are not the essential characteristics of a vein or lode absolutely wanting? In the absence of the very elements which constitute a vein, as defined by the highest court of our country, how can we hold a vein exists? There appears to be no mineralization in excess of that contained in the country rock; the existence of no body of mineral or mineral-bearing rock in any opening or fissure established. No witness, save Mr. Akers, attempted to locate the foot wall of the vein, and he, as we have noticed, at but one place, about 20 feet west of station 643 on the 600 level, in judgment only; for his evidence is not direct or satisfactory as to the fact. Several witnesses at a few points attempted to fix the hanging wall; but in each instance the testimony respecting it seems to point to an arbitrary location, for the fracturing, which they claim to be the limits of the vein, extends far to the west of the places pointed to as the hanging wall. We doubt if the most careful scrutiny of a scientific expert on mines could, from the description of the material in evidence, locate what, in the judgment of those witnesses, is the hanging wall. It seems to

exist in opinion only. Nor does the fracturing stop at the Grand Central ore bodies. It is shown in evidence to extend, at least, as far west as the Grand Central shaft, more than 1,000 feet beyond where that wall was attempted to be located. No court would be justified in holding that, in such a formation as this, the limits of fracturing constitute the limits of the vein. Such a holding would be alike unreasonable and impracticable. It would convert practically all that whole limestone area into a vein—a vein thousands of feet wide, the like of which, we venture to say, no geologist or miner has ever known. Even if there be found an occasional vugg or fragment of ore, yet, where it is disconnected from any ore body, and so intermingled with and surrounded by country rock that it cannot be regarded as continuous, it does not mark the line of a vein or lode, within the meaning of the law. Bunker Hill & S. M. & C. Co. v. E. St. Ida. M. & D. Co. (C. C.) 134 Fed. 268; Cheesman v. Shreeve (C. C.) 40 Fed. 787; Iron & Silver Min. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712.

Upon very careful scrutiny of the evidence, we are of the opinion that the court did not err in rejecting the theory that the limits of fracturing constituted the limits of the vein, nor in holding that the vein existing in the south end of lot 38 did not continue in that lot north of the north end of the Cunningham stope. Where, then, and in what direction, does the vein proceed on its strike from that stope, and where are its boundaries or limits? That the Mammoth vein was formed by replacement—by replacing the limestone, molecule for molecule, with mineral through the thermal and chemical waters, or corroding vapors or solutions, ascending from the deep through the fissure or series of fissures constituting the lode—and that, where the ore appears, the fissure or opening was widened and large cavities created and filled with ore, through metasomatic action, appears manifest from the evidence. The acid and corrosive solutions acting upon the limestone corroded it or dissolved it, and the limestone thus precipitated the ore by depositing it out of the solutions. Thus, evidently, the ore bodies were built up particle by particle by dissolving the limestone and precipitating the ore, or by replacing the limestone with ore. It appears in evidence that great masses of ore are found in which the original bedding planes can yet be traced, these planes not having been obliterated by the metasomatic change. These things are not denied by the witnesses for the appellant, but, on the contrary, its leading witness admits that there are evidences of metasomatic change in the Mammoth vein, although he says he has heard or read of no mines in limestone where the process of replacement was so limited as in these mines. It also appears in evidence, as has been observed, that in running from an ore body into limestone anywhere barren rock will be encountered within a few inches or a few feet of the ore. In other words, the limit of the ore everywhere is practically barren rock or barren material. This clearly

appears from the testimony of Col. Wall and of Mr. Loose. According to the decided weight of the evidence, the mineralization practically ceases everywhere within a short distance from the ore bodies. The vein and ore bodies, going northerly from the Mammoth shaft, rarely reach a width of 100 feet. This condition of things exists all along the fissure northerly through the great ore bodies to the Cunningham stope, thence through the ore bodies in the direction of the lines U-T and T-S. It is the same on each side of where the vein passes through the dyke, and the country in the vicinity of the dykes, where the vein penetrates them, is very much crushed and shattered. The direction of the ore channel and ore bodies will readily be observed from the diagrams. It will be noticed that the ore channel, although irregular and changing its course at the Cunningham stope and at the Bradley Consort line, is continuous clear through from the Mammoth shaft to north of the Butterfly stope, a distance of more than 2,000 feet, and more than 1,400 feet, as we have seen before, in the northwesterly direction from the Cunningham stope, and doubtless the course of a vein longitudinally, as it passes through the country, is its strike. That the vein has well-defined boundaries and strike from the south end line of lot 38 to the north end of that stope, a distance of about 700 feet, is not controverted; but from there on in the northwesterly direction, although the same conditions continue to exist, the appellant insists that the ore bodies are on the dip, and not on the strike, of the vein. But why not on the strike? What facts are there established by the evidence that show the ore bodies on the dip and not on the strike? We must confess our inability, upon most careful scrutiny of the mass of evidence, to find anything to warrant us in sustaining the contention of the appellant. The character of the fissure, the processes that evidently controlled in the deposition of the ore, the characteristics of the vein where it is not in dispute and those where it is in dispute, including the continuity of the ore in the line of the channel, the barrenness of the rock as you recede from the ore, the dip of the vein and of the back fissure, yet to be adverted to, the similarity of the earth and rock throughout the limestone area outside of the ore bodies and dykes, some prominent geological features yet to be noticed, all militate against the contention and point unerringly, it seems, to the line marked by the ore channel as the location and strike of the vein, and to the limits of the deposition of ore as the limits of the vein.

Reverting to the geological features, just mentioned and before referred to, we will first notice the dip of the vein and back fissure, and here the appellant in its contention encounters a serious obstacle; for in vain will the record be searched for a degree of inclination that would carry a vein from lot 38 to the ore bodies in dispute. The vein and ore bodies, wherever explored, occupy almost a vertical position. As we have shown by a review of the evidence, at the Mammoth shaft the vein and ore go to the deep so nearly vertical

that on the 1,900 level, a distance of 1,800 feet, the westing is but 100 feet, and the dip over 86° from the horizontal. The dip of the back fissure is shown to be about the same from the Finn tunnel to the 800 level, a distance of 688 feet; the Finn tunnel being 92 feet, and the 800 level 135, west of the west side line of lot 38, making a westing of but 43 feet and a dip of 86½°. So we have seen that, on the Grand Central side, from top of the winze on the 400 down to the 1,000 level, the dip is 82° from the horizontal, and that along the line U-T, where the ore bodies in dispute occur, the dip is 75° to 80° from the horizontal. Now, considering the dip of the veins, as thus shown in both mines, in connection with the long distance, apparent from the surface maps, intervening between the west side line of lot 38 and the ore bodies and vein on the Grand Central side, is it not clear, without further demonstration, that no dip is shown that could carry a vein from lot 38 to the controverted ore bodies and vein in the Grand Central mine? Such certainly seems to be the fact under the proof. * * *

Not unmindful of the grave responsibility that attaches to the final decision of a case of such magnitude and importance, we have examined with commensurate caution the voluminous mass of evidence, in extended and deliberate discussion have announced our views upon the various questions involved, and have come to the inevitable conclusion that the appellant has shown no right of recovery under its counterclaim and no right to amend its pleadings.

The judgment must therefore be affirmed. It is affirmed, with costs.

Section 2.—Placers.

FEDERAL STATUTE.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. Rev. St. U. S. § 2329.

GREGORY AND ANOTHER v. PERSHBAKER AND ANOTHER.

1887. SUPREME COURT OF CALIFORNIA. 73 Cal. 109, 14 Pac. 401.

PLAINTIFFS are grantees and successors in interest of Johnson and others, who, on December 14, 1882, located the Lucretia mining claim upon gold-bearing mineral land of the United States, in Butte county, California. Defendant, on December 22, 1882, filed his application for a patent to the Howard mining claim, which included a portion of the Lucretia location. Plaintiffs brought this action,

under sections 2325 and 2326, Rev. St. U. S., to have the question of right of possession of the claim determined. The Magalia Mining Company, by leave of the court, intervened, claiming an interest in the location through defendant. The court found that neither plaintiffs, defendant, nor intervenor had any title. Plaintiffs appealed. Other facts are sufficiently stated in the opinion.

McKinstry, J.[12] 1. It is contended by the defendant and the intervenor (respondents) that the mineral, if any, found in the land claimed by the plaintiffs herein, constitutes a lode within the meaning of the acts of congress; that ledges or lodes can be located only in a manner entirely different from the mode adopted by plaintiffs' predecessors; and therefore, however regular their surface location might have been as a location of a placer claim, it is invalid because no placer exists within its limits.

Finding No. 51 of the court below is as follows: "That in the year 1856, John Barrett, and others associated with him, discovered on the westerly bank of Little Butte creek, on the south-east quarter of said section 13, a thin seam of gravel cropping out between an underlying bed of slate rock and an overlying bed of lava rock; and, finding that the said seam of gravel was gold-bearing, located the same as and for a mining claim under the name and designation of the 'Burch and Barrett Claim,' and thereupon commenced to work and develop their said claim by excavating a tunnel into the hill, following the course of the channel, and the said channel became thicker and better developed and more valuable as they pursued and explored the same into the hill, and showed that the said deposit was a well-developed channel, varying from a few inches to eight and ten feet in thickness, and from eight or ten to forty feet in breadth, with a well-defined bed and side walls of slate rock, and capped by a thin stratum of clay, with an overlying body of lava rock for hanging wall. Prior to the year 1879 the said John Barrett, by mesne conveyances from his associates in said location, became sole owner of the said Burch and Barrett location, and in that year sold and conveyed the same to the intervenor, the Magalia Gold Mining Company, a corporation duly formed and organized under the laws of the state of California, and the said intervenor thereupon entered into and took, and thence hitherto has kept and held, and still holds, the possession, and has ever since continued the work of exploring and pursuing and working and mining the said gravel deposit in and along the said channel or bed, and had, in the spring of the year 1882, pursued and opened and worked the said gravel channel or bed in said south-east quarter of said section 13, and in the direction of the said south-west quarter of said section, and had discovered that the said gold-bearing channel extended towards and probably into the said south-west quarter, and that the said south-east quarter of section 13 contained deposits of gold-bearing gravel in quantity

[12] Parts of the opinion are omitted.

sufficient, not only to pay for working and mining the same, but sufficient to render the said quarter section of great value for mining purposes. That, after the commencement of this action, the said Magalia Gold Mining Company projected and extended its tunnel, mentioned in these findings, into said south-west quarter of said section 13, following the said gold-bearing deposit or channel. That said channel in its course into the hill descends or drops at an angle on an average of about eight degrees. That the bed-rock of said channel, during its entire length so far as worked, is composed of a slate formation, and upon that slate formation said gravel rests, and over said gravel is a formation of clay gouge, overlapping said mineral deposit, and that above said clay seam is the lava which extends to the surface; and that the overlying lava rock, at the point where the said channel crosses the easterly line of the said south-west quarter aforesaid, is about six hundred feet in thickness. That said gravel is of a hard nature, and in mining and extracting the same has to be detached from its position by the use of picks and gads, and, when extracted, is taken out to the surface, and there washed, and in so washing gold is extracted therefrom. That neither gold nor any other mineral was discovered within the boundaries of said south-west quarter of said section 13 until the said tunnel of said Magalia Company penetrated therein, as aforesaid. That said pay-streak of gravel and deposit does not crop out at any other place or places than the place where the same was discovered, as aforesaid; and that the same cannot be seen or reached without entering the works of the said Magalia Gold Mining Company, and following the trend and meanderings of said channel to the present face of the mineral deposit, except by sinking a shaft or running expensive tunnels other than those run, occupied, and used by the intervenor therein."

In support of their view, counsel cite the *Eureka Case,* 4 Sawy. 302, and other decisions following and referring to that. In the *Eureka Case,* Mr. Justice FIELD of the supreme court of the United States said: "we are of opinion that the term [lode] as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." It includes, to use the language cited by counsel, "all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes." This definition would not include a bed of gravel from which particles of gold may be washed. The words "mineralized rock" were evidently intended to qualify the last as well as the first sentence. That which in the *Eureka Case* was declared to be a "lode" was a zone of *limestone* lying between a wall of quartz and a seam of clay or shale, the one having a dip of 45 deg., and the other of 80 deg.

Section 2320 of the Revised Statutes of the United States (1873-

74) treats of "mining claims upon veins or lodes of quartz or other rock in place bearing gold;" section 2322, of veins, lodes, and ledges "the *top or apex* of which" lies inside of surface lines extended vertically downward.

In Seane's Neuman and Barretti (by Valazquez) a "placer" is said to be "a place near the bank of a river where gold dust is found." In the last edition of Webster, which gives the meaning of the term as approved by usage in Mexico and California, it is defined: "A gravelly place where gold is found, especially by the side of a river, or in the bed of a mountain torrent." Whatever the origin of the subterranean channels containing gravel beds, they have long been known to exist in California, and they have been generally supposed to be, and generally spoken of as, the beds of ancient rivers in which the gravel was deposited by fluvial action, and which were either from their beginning subterranean, or upon which the superincumbent earth or rock has been hurled by means of convulsion, caused by volcanic or other natural force. That the bed of gravel mentioned in the findings, to the limited extent it has been prospected by the intervenor's tunnel, "descends or drops on an average of about eight degrees," does not of itself make the gravel deposit a lode with "a top or apex," nor contradict the theory that the channel was the channel of a mountain stream or torrent.

The terms employed in the acts of congress are used in the sense in which they are received by miners. The *Eureka Case, supra.* Moreover, by express enactment, "claims usually called placers" are declared to include all forms of deposit, "excepting veins of quartz or other rock in place." Rev. St. U. S. § 3229. Referring to the common use of the word by miners, to the dictionaries, and to the adjudications of courts, the gravel bed with gold therein, as described in the finding, is a placer.

Other findings of the court below strengthen this conviction. The court found that for a long time the land which is the subject of this action was generally reputed and understood throughout the mining district in which it is to be valuable placer mining ground, through which ancient channels, containing gravel-bearing gold in paying quantities, extended. No. 13. While it does not appear, except inferentially, that ground like that in controversy was generally located as placer, neither does it appear that there were district laws with respect to locations of veins, lodes, or ledges; and, on the other hand, the district laws with reference to the location of flat and placer claims are set out in the findings at length. It further appears that the intervenor attempted to locate the ground as and for a placer claim, and its application for a patent was based on that location. * * *

Judgment reversed, and cause remanded for a new trial.[13]

[13] See 1 Lindley on Mines (2 ed.) § 427; Costigan, Mining Law, 136.

WEBB v. AMERICAN ASPHALTUM MINING CO.

1907. Circuit Court of Appeals, Eighth Circuit.
84 C. C. A. 651, 157 Fed. 203.

In Error to the Circuit Court of the United States for the District of Colorado.

Before Sanborn and Van Devanter, Circuit Judges, and Phillips, District Judge.

Sanborn, Circuit Judge. This action involves the title and the right of possession of a lode or vein of asphaltum of the kind commonly called "gilsonite," upon which the grantors of the plaintiff, Webb, located a placer claim, and the grantor of the defendant, the American Asphaltum Mining Company, subsequently located two lode mining claims. The defendant applied for a patent, the plaintiff filed an adverse claim, and brought this action to determine the title. The case was tried by the court upon an agreed statement of facts and some extraneous testimony, and the court found for the defendant. The latter's objection to the consideration of the question whether or not this finding is sustained by the evidence would be well founded, were it not for the fact that the agreed statement discloses all the material facts, and the evidence which was taken was immaterial. Hence the issue of law arises in this court whether or not the agreed facts sustained the judgment, and that issue is dependent upon the true answer to the single question: May the right to the possession and to the title to a vein or lode of asphaltum in rock in place be secured by the location of a placer claim upon the land in which it is found?

A vein or lode is mineral-bearing rock or other earthy matter in place in a fissure in rock, so that its boundaries are sharply defined by rocky walls in place. A lode location is the location of such a lode or vein in the manner prescribed by the acts of Congress. A placer location is the location in accordance with those acts of a tract of land for the mineral bearing or other valuable deposits upon or within it that are not found in lodes or veins in rock in place. It is a claim of a tract of land for the sake of loose deposits on or near its surface. Clipper Mining Company v. Eli Mining & Land Company, 194 U. S. 220, 228, 24 Sup. Ct. 632, 48 L. Ed. 944. The plaintiff in this case has made no claim of right or title under section 2333 of the Revised Statutes [U. S. Comp. St. 1901, p. 1433], and the statements and discussion herein have no relevancy to such a claim or to the proper construction of that section. By section 2319 of the Revised Statutes all valuable mineral deposits in lands belonging to the United States are declared to be free and open to exploration and purchase. By the second section of the act of July 26, 1866 (14 Stat. c. 262), the location and acquisition by means of a lode mining claim of any "vein or lode of quartz, or other rock in place

bearing gold, silver, cinnabar, or copper" were authorized. By Act July 9, 1870, c. 235, 16 Stat. 217, Rev. St. § 2329 the act of 1866 was amended by adding section 12, which provided "that claims, usually called 'placers' including all forms of deposit, excepting veins of quartz or other rock in place" might be entered and patented. By the act of May 10, 1872, section 2 of the act of 1866 was repealed and authority was granted to qualified citizens to locate and acquire by means of lode mining claims "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits." Act May 10, 1872, c. 152, §§ 2, 9, 17 Stat. 91, 94, Rev. St. § 2320.

The asphaltum here in controversy is a solid valuable mineral deposit commonly called "gilsonite" which is found in a vein or lode in rock in place. But counsel for the plaintiff insist that it is not subject to location as a lode because it is not a metalliferous deposit. They say that while it falls within the literal meaning of the words "other valuable deposits" in section 2320, those words should be interpreted by the rules noscitur a sociis and ejusdem generis, and that, as all the deposits specified in that section bear metal, the intention of Congress must be presumed to have been to restrict the meaning of that term to deposits of the same kind. The rules that, where general words follow specific words, the former are presumed to treat of things of the same character as the latter, and that words and terms should receive the interpretation which the same or similar terms must have in the same or like relations, are persuasive, and the argument founded upon them might have proved convincing if other considerations could have been ignored. But the term "other valuable deposits" occurs in a general statute enacted to provide a comprehensive and complete system for the disposition of the mineral deposits in the lands of the United States. Separate sections or clauses of this general legislation may not be lawfully segregated from the body of the statutes upon this subject and interpreted without reference to the purpose and general effect of the other laws relating thereto, but all the parts of this legislation must be considered and construed together, to the end that, if possible, it may become and be a uniform and practical system of regulation and of action.

Section 2318 provides that all "lands valuable for minerals" shall be reserved from sale, except as otherwise expressly directed. Section 2319 declares that "all mineral deposits in lands" belonging to the United States shall be open to exploration and purchase. Section 2320 specifies the method by which "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits" may be secured, and section 2329 provides that "claims for placers including all forms of deposit, excepting veins of quartz or other rock in place may be entered and patented." The "mineral deposits" treated in this legislation include nonmetalliferous deposits, alum, asphaltum, borax, guano, diamonds, gypsum, resin,

marble, mica, slate, amber, petroleum, limestone, and building stone, as well as deposits bearing gold, silver, and other metals, and the term "lands valuable for minerals" in the law means all lands chiefly valuable for any of these mineral deposits rather than for agricultural purposes. Northern Pacific Ry. Co. v. Soderberg, 188 U. S. 526, 534–537, 23 Sup. Ct. 365, 47 L. Ed. 575; Pacific Coast Marble Co. v. Northern Pacific R. R. Co., 25 Land Dec. Dep. Int. 233, 240.[14] Thus it clearly appears that the plan of this legislation was to provide two general methods of purchasing mineral deposits from the United States—one by lode mining claims where the valuable deposits sought were in lodes or veins in rock in place, and the other by placer mining claims where the deposits were not in veins or lodes in rock in place, but were loose, scattered, or disseminated upon or under the surface of the land. The test which Congress provided by this legislation to be applied to determine how these deposits should be secured was the form and character of the deposits. If they are in veins or lodes in rock in place, they may be located and purchased under this legislation by means of lode mining claims; if they are not in fissures in rock in place but are loose or scattered on or through the land they may be located and bought by the use of placer mining claims. Reynolds v. Iron Silver Mining Co., 116 U. S. 687, 695, 6 Sup. Ct. 601, 29 L. Ed. 774; Clipper Mining Co. v. Eli Mining & Land Co., 194 U. S. 220, 228, 24 Sup. Ct. 632, 48 L. Ed. 944.

The maxims, noscitur a sociis and ejusdem generis, are but aids to discover the true intention of the legislative body, not arbitrary rules to be used to thwart its purpose, and they may not be permitted to prevail where the words of the statute and the entire act in which they appear, or the entire body of legislation which constitutes the legislative scheme upon the subject, clearly show that the application of these rules would have the latter effect. The words "other valuable deposits," in section 2320, taken in their common signification, include gilsonite and the other solid forms of asphaltum, for these are valuable mineral deposits; the body of legislation, of which section 2320 and this term are a part, treats of nonmetalliferous as well as metalliferous deposits, and gilsonite or hard asphaltum in a vein or lode in rock in place is one of the valuable deposits upon which a lode mining claim may be lawfully located under this section.

In 1897, however, Congress enacted "that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils,

[14] "Whatever is recognized as mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality to render the land more valuable on account thereof than for agricultural purposes should be treated as coming within the purview of the mining laws." Pacific Coast Marble Co. v. Northern Pacific R. Co., 25 Land Dec. Dep. Int. 233, 244.

and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims" (Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434]); and counsel for the plaintiff contend that gilsonite and the other forms of asphaltum are mineral oils and may be purchased from the government under this statute by locating placer claims upon the land in which they are found. Asphaltum varies in its consistency from a liquid or semi-liquid to a hard or solid condition. The deposit here under consideration is gilsonite, and is neither a liquid nor a semiliquid, but a hard, solid substance. Conceding that this and other solid forms of asphaltum may fall within the scientific and true significance of the term mineral oils used in this act of 1897, they would not in our opinion fall within the meaning which that term would convey to the mind of a citizen of ordinary intelligence. To such a man the words convey a description of a fluid, and not of a solid substance. The act of 1897 was not enacted for scientists or for those specially learned in the composition and analysis of geological formations alone or chiefly, but for citizens of common intelligence and learning who might desire to buy valuable deposits upon the lands of the United States and to them the significance of these words "other mineral oils" in this law, following, as they do, the word "petroleum," which describes a liquid, is liquid or semiliquid mineral oils, and it does not include gilsonite or the hard forms of asphaltum. The sense in which the reader of ordinary knowledge and intelligence would take these words, the obvious common meaning of them, should be preferred to the recondite signification which would include the solid forms of asphaltum, and for this reason the act of 1897 did not authorize the entry of lands which contain these deposits by means of placer claims.

Again, a deposit of asphaltum in a lode or vein in rock in place was locatable, as we have seen, by means of a lode mining claim, and it was not subject to location by a placer claim under the acts of 1866 and 1872, when the act of February 11, 1897, was passed. Prior to August 27, 1896, the officers of the land department had held that lands valuable for petroleum might be entered and patented by means of placer claims (In re Rogers, 4 Land Dec. Dep. Int. 284; In re Piru Oil Company, 16 Land Dec. 117; Gird v. California Oil Company [C. C.] 60 Fed. 531), but on that day the Secretary of the Interior decided that they could not be thus located. Union Oil Company, 23 Land Dec. Dep. Int. 222. The nature of the act of 1897 and the fact that it was passed at the next session of Congress after this decision strongly indicate that it was not the intention of that body to change thereby the prescribed method for the entry of veins of asphaltum in rock in place, but that its only purpose and the only effect of the act were to restore the rule and practice regarding petroleum and other mineral oils which were not found in veins or lodes which had prevailed before the decision in the Union Oil Com-

pany Case, so as to authorize the entry of lands which contain them by placer claims.

Our conclusion is that gilsonite and the harder forms of asphaltum in veins or lodes in rock in place may be entered and patented by means of the location of the lode mining claims thereon, and that they may not be secured by means of placer claims upon the land in which they are found.

This was the judgment of the court below; and it is affirmed.[15]

[15] In Morrison's Mining Rights, 14 ed. 243, Messrs. Morrison and De Soto seemingly doubt the soundness of the decision in the principal case.

CHAPTER II.

WHO MAY AND WHO MAY NOT LOCATE MINING CLAIMS.

FEDERAL STATUTE.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. Rev. St. U. S. § 2319.

Section 1.—Aliens.

DUNCAN v. EAGLE ROCK GOLD MINING & REDUCTION CO.

1910. SUPREME COURT OF COLORADO. 48 Colo. 569, 111 Pac. 588.

ACTION by the Eagle Rock Gold Mining & Reduction Company against John T. Duncan. From a judgment for plaintiff, defendant appeals. Reversed.

WHITE, J.[1] John T. Duncan made application through the proper United States Land office for patent to certain lode mining claims designated as survey lot No. 17,375, situate in Sugar Loaf Mining district, Boulder county. The Eagle Rock Gold Mining & Reduction Company filed an adverse, and thereafter within the time limited by law this suit in support thereof, claiming of Duncan's lodes substantially all of the Black Prince, Black Prince No. 1, and Black Prince No. 2, located in 1904, as portions of its Ellmettie and Grace lodes, located in 1898, Oro and Anna G., located in 1899, Everett, Washington, and Monarch, located in 1900, and demanding damages, reasonable attorney's fees, and expenditures in support of the adverse. By the complaint the legal right to occupy and possess

[1] Parts of the opinion are omitted.

said premises and to the possession thereof was claimed "by virtue of full compliance with the local laws and rules of miners of said mining district, the laws of the United States and of the state of Colorado, by pre-emption and purchase, and by actual possession as lode mining claims located on the public domain of the United States." Duncan, defendant below, denied specifically the allegations of the complaint, and alleged title in himself to the territory in question. The replication traversed the allegations of the answer. Upon the issues so joined, trial was had, resulting in a verdict for plaintiff, the appellee here, for possession of the territory in dispute, $225 expenses and counsel fees, in support of the adverse, and $700 damages. Motion for new trial interposed and overruled, judgment in accordance with verdict entered, and writ of restitution ordered. From the judgment Duncan prosecutes this appeal, and assigns numerous errors, only a few of which we deem it necessary to consider.

Appellee, to prove its corporate existence and its citizenship, introduced in evidence a certified copy of its articles of incorporation showing that it was duly organized and existing as a corporation under and by virtue of the laws of the state of Colorado. No other proof of the citizenship of its stockholders was made, and it is contended that citizenship in that respect was not established. It appears from Jackson v. White Cloud Gold Mining & Milling Co., 36 Colo. 122, 85 Pac. 639, that the proof upon the matter in question was sufficient. Appellee acquired some of its claims by purchase and the others by location. Of the former were the Ellmettie and the Grace. The Ellmettie location certificate was filed by F. J. Rogers and William Capp, and an amended certificate thereof by William and M. L. Capp. The Grace location certificate was filed by William Capp. There was no evidence that Rogers or either of the Capps at the time of making the respective locations, or the conveyance of the claims to appellee, were citizens, or had declared their intention of becoming citizens, of the United States. Appellant contends that the appellee could not sustain its adverse as to these two claims because it failed to prove the citizenship of the original locators, and in support of his contention cites several authorities.

In Lee v. Justice Mining Co., 2 Colo. App. 112, 29 Pac. 1020, after announcing the statutory rule that none but citizens of the United States, and those who have declared their intention to become such, can acquire any right to public mineral lands, it is held that an alien cannot acquire such an interest in a mining claim upon the public domain by location as can be sold, and upon which a subsequent title can be predicated. That case was carried to this court, however, and in 21 Colo. 260, 40 Pac. 444, 52 Am. St. Rep. 216, was overruled; it there being held that the Court of Appeals was in error in assuming that the record in the case presented a question as to the right of an alien to acquire by location a transferable interest in a mining claim,

as that question could not, under the facts there presented, be raised. In Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019, the title to a mining claim, based upon a prior location made by one Joseph Hudson and the Kansas City Mining & Smelting Company, a corporation, and by them assigned or conveyed to Chisholm, the defendant, was under consideration in an adverse suit, and it was expressly held necessary to allege and prove the citizenship of the original locator or locators, as well as the citizenship of the successful party to the action.

Appellee contends, notwithstanding these decisions, that the citizenship of the original locator is material only where he continues to be the claimant to the time of the institution and determination, of an adverse suit. It must be conceded that many authorities so hold. Such is the doctrine announced in Morrison's Mining Rights (12th Ed.) p. 286; Lindley on Mines, § 233, and other authorities.[2] We are constrained, however, to adhere to the doctrine, heretofore announced by this court, until there is a specific holding to the contrary by the United States Supreme Court. Appellee insists that such pronouncement has already been made by that tribunal, and that the doctrine of Thomas v. Chisholm, supra, has been overturned in McKinley Creek M. Co. v. Alaska M. Co., 183 U. S. 563, 571, 22 Sup. Ct. 84, 46 L. Ed. 331, and Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532. We are of the opinion that neither of the cases goes to the extent claimed by appellee. Manuel v. Wulff holds that a deed of a mining claim by a qualified locator to an alien operates as a transfer of the claim to the grantee, subject to question in regard to his citizenship by the government only, and if such alien becomes a citizen, or declares his intention to become such at any time before judgment in a contest concerning such mining claim, the alien's disability to take title is thereby removed. In that case, on page 511 of 152 U. S., on page 653 of 14 Sup. Ct. (38 L. Ed. 532), it is said: "We are of opinion on this record that as Alfred Manuel (the original locator) was a citizen, if his location were valid, his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was under the circumstances open to question by the government only. Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered. * * * And as Moses Manuel was the grantee of a qualified locator, and became naturalized before the order, we conclude that there was error in the

[2] See Costigan, Mining Law, 167–169.

direction of a nonsuit."[3] McKinley Creek Mining Co. v. Alaska Mining Co., supra, does not appear to be an adverse, but rather a controversy in which the federal government was neither directly nor indirectly interested. * * *

It appears by these decisions that the court went no further than to hold that whoever is occupying the public domain under an apparent valid claim has a right to so continue until ousted by the government itself; that is, the citizenship of the holder and the original locator of the mining claim is subject to question only by the sovereign. In support of the proposition that a location made by an alien can be conveyed to a citizen, and when vested in the latter is as complete as if originally acquired by him by location, and that the government itself cannot assail his title, Mr. Lindley in his work on Mines, § 233, argues that, if the government can, by direct conveyance to an alien, vest in him a title to the absolute fee, it follows that an alien can acquire a limited estate by location, subject to an inquiry as to his qualifications, when he seeks acquirement of the ultimate fee. Unquestionably the sovereign is a competent grantor in all cases in which an individual may grant, but in the case of mining claims it will not, and does not knowingly, grant to an alien. Inasmuch, however, as every person is supposed a natural born subject that is resident in the kingdom, the sovereign in effect says to all, a certificate of location of a mining lode, complete in itself, gives an apparent right which must be recognized until the sovereign inquires into its validity. When the inquiry is made, the apparent right becomes—what it really is—no right at all.

The mineral lands of the United States are open to exploration and purchase only by citizens of the United States, or by those who have declared their intention to become such. As citizenship goes to the very inception and initiative of the title or right to hold as against the government, a noncitizen can never make a valid location, though one so made is apparently valid. Proceedings to obtain title to mining property are in the nature of "inquest of office." "In such cases the sovereign is a party in fact to the proceeding, which is a direct one, for the procurement of title, and the objection of alienage, no matter by whom suggested, is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in realty. If, however, the grant of title, or the equivalent, is made to an alien, it cannot be attacked by any third party." Billings et al. v. Aspen M. & S. Co. et al., 52 Fed. 250, 3 C. C. A. 69. * * *

We will not prolong this opinion by discussion of other errors as-

[3] On the effect of Manuel v. Wulff, see McKinley Creek Min. Co. v. Alaska United M. Co., post p. 192.

or decrease a mining claim and in the interest of office may hear and dispose of the same in like manner as a dft.

(2) Proceedings to obtain pats. are in the nature of ingress of office, and in such proceedings citizenship is a necessary and material fact to be alleged and proved.

(3) In all other classes of actions bet. individuals with which the govt. has no concern & powers any — mere averment of citizenship is not a fact in issue; it need neither be alleged nor proved. Manuel v. Wulf, 107 Fed. 715.

(4) Naturalization of an alien at any time subsequent to either location or purchase is retroactive and enables him to proceed to patent. The antecedent bar to pat. because of his alienage is removed.

(5) An alien may take title by descent to an unpatented mining claim in the absence of a State law inhibiting it. He may hold such title until office forced, Lockhaven v Helmer, 104 Fed. 178.

All these seem materially changed in view of what S.C.U.S. said in McKinley M Co v. Alaska M Co 183 U.S. 572 (1902)

Only point at all open in — alien locates and conveys to cit. who seeks to pat. and is answered and objected with results. Alien owned home declares intention & goes to fight. and pat. if he had not conveyed what effect that he no longer claims and cit. and claims under his location? How is Duncan-Eagle Rock case

July 28/19

[illegible] how we by
[illegible] rather than
cases.

CHICAGO BEACH HOTEL
CHICAGO

In that case it is held that alien's claim by
grantee of alien locator must fail —
Note - probably was not alien, from fact
he was citizen and
it. Hence case did not go to S.C.U.S.
Reason given (7 FI) is that govt will
not grant to alien. But no one
is asking it to. It is asked to
grant to a citizen - namely the
grantee of the locator — and can
seem to the mind like the case
of alien locator who declares
intention during [illegible] and
omits, as that when govt is
called on to convey to him he
a cit.

Of course, out of abundance of caution
one applies to naturalize and [illegible]
citizenship from beginning to end of [illegible]
of life in adverse suit.

See Matlock v. Stone, 77 Cal. 195. Also
is seemingly effect as Sayles Rock Case

But contra - that and necessary to find that
applicant for pat. is a cit. Tonopah Fraction M
& M. Co. v. Douglass, 123 Fed. 936, 941.

signed, as it is clearly evident the judgment must be reversed, and it is so ordered.

Judgment reversed.[4]

Section 2.—Corporations.

DOE v. WATERLOO MIN. CO.

1895. CIRCUIT COURT OF APPEALS. 17 C. C. A. 190, 70 Fed. 455.

APPEAL from the Circuit Court of the United States for the Southern District of California.

This was a suit commenced by John S. Doe against the Waterloo Mining Company, pursuant to Rev. St. §§ 2325, 2326, to determine the right of possession of mining lands for which conflicting applications for patents had been filed. A demurrer to the complaint was overruled (43 Fed. 219) and a decree was rendered for the defendant (55 Fed. 11). Complainant appeals. Affirmed.

Before GILBERT, Circuit Judge and KNOWLES and HAWLEY, District Judges.

KNOWLES, District Judge.[5] * * * The thirteenth assignment of error is that the decree was erroneous because it does not appear in the pleadings, anywhere, that the stockholders of the Waterloo Mining Company, the defendant, were citizens of the United States. * * *

[4] Compare the case of Waskey v. Hammer, post, p. 82. In Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540, an ejectment action for mining claims not brought in support of an adverse claim, Shaw, J., for the court, in affirming a judgment for the plaintiffs, said:

"The finding to the effect that each of said plaintiffs was a citizen of the United States is not supported by the evidence. That question, however, was not in issue, and, so far as it concerned the rights of the parties to this action, it was wholly immaterial whether plaintiffs were citizens or aliens. Their citizenship is a matter which concerns the government of the United States only. Notwithstanding the fact that the contrary has been held in some jurisdictions, it is now well settled by the decisions of the courts of the United States that the question of qualification of the locator of a mining claim, so far as the validity thereof is affected by his alienage, is one which cannot be raised or determined in actions between private individuals wherein the United States is not made a party. Billings v. Smelting Co., 51 Fed. 338, 2 C. C. A. 252; Manuel v. Wulff, 152 U. S. 507, 14 Sup. Ct. 651, 38 L. ed. 532; McKinley Creek Min. Co. v. Alaska Min. Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. ed. 331; Snyder on Mines, § 267; Costigan on Mining Law, § 47; Tornanses v. Melsing et al., 109 Fed. 710, 47 C. C. A. 596."

The issue of citizenship is properly raised in an adverse suit, as the United States is a quasi or silent party to it, (Matlock v. Stone, 77 Ark. 195, 91 S. W. 553; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833,) though it is not a party for all purposes. Butte Land & Investment Co. v. Merriman, 32 Mont. 402, 80 Pac. 675.

[5] Parts of the opinion are omitted. See post p. 177 for some of such parts.

The question presented in the thirteenth assignment of error affects the jurisdiction of the lower court and of this court. It does not appear in any of the pleadings or in the evidence that the stockholders of the Waterloo Mining Company were, all or any of them, citizens of the United States. The plaintiff would not be benefited by this omission if it were true that none of said stockholders were citizens. It is alleged in the answer that Newbill and his colocators were all citizens of the United States. This fact is stated in their location notice, and that is in evidence in this case. Newbill and Parks both testify to their citizenship. An affidavit of one Emil A. Sanger, in evidence, states that all of said locators were citizens of the United States. The grantees of these locators would be entitled to the possession of the premises located, as against plaintiff. Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651. The question might be considered as affecting the duty of the court to find against the defendant. In the case of McKinley v. Wheeler, 130 U. S. 630, 9 Sup. Ct. 638, the supreme court holds that a corporation all of whose stockholders are citizens of the United States had the power to locate a mining claim. The inference is, although not stated, that only corporations whose stockholders are citizens of the United States can locate such claims.[6] Section 2325 of the Revised Statutes

[6] "The sole question presented for our determination is whether a corporation created under the laws of one of the states of the Union, all of whose members are citizens of the United States, is competent to locate or join in the location of a mining claim upon the public lands of the United States in like manner as individual citizens. The question must, of course, find its solution in the enactments of congress.

"Section 2319 of the Revised Statutes provides as follows: 'All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.' It will be observed that no prohibition is here made against citizens of the United States uniting together for the occupation and purchase of public lands containing 'valuable mineral deposits.' Nothing is said of partnerships or associations or corporations. It is to citizens that the privilege is granted, and that they may unite themselves in such modes in all other pursuits was, as a matter of course, well known to those who framed as well as to those who passed the statute. There was no occasion for special reference to the subject to give sanction to these modes of uniting means to explore for mineral deposits and to develop them when discovered. * * * At the present day nearly all enterprises, for the prosecution of which large expenditures are required, are conducted by corporations. * * * They are little more than aggregations of individuals united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution. We think, therefore, that it would be a forced construction of the language of the section in question, if, because no special reference is made to corporations, a resort to that mode of uniting interests by different citizens was to be deemed prohibited. There is nothing in the nature of the grant or privilege conferred which would impose

provides that persons who can locate mining claims may make an application to patent the same. The question would arise, how is this citizenship of stockholders to be established? It is alleged in the bill, and expressly admitted in the answer, that the appellee is a corporation organized and existing under the laws of Wisconsin. A certified copy of its articles of incorporation were introduced in evidence. Section 2321, Rev. St., provides:

"Proof of citizenship under this chapter may consist in the case of an individual of his own affidavit thereof, in the case of an association of persons unincorporated, of the affidavit of their authorized agent made of his own knowledge or upon information and belief, and in the case of a corporation organized under the laws of the United States or of any state or territory thereof by the filing of a certificate of incorporation."

The question might arise, why would the certificate of incorporation establish the citizenship of the stockholders? In considering the question of jurisdiction in the federal courts, it is an established rule that, when a corporation organized under state laws is a party, it is conclusively presumed that the stockholders thereof are all citizens of that state. Muller v. Dows, 94 U. S. 445. Congress was familiar with this rule, and it seems probable intended to establish a similar rule under the mineral land act of 1872. The practice in the United States land office has been, I think, universal, not to require of a corporation seeking to patent mining ground proof of the citizenship of its stockholders, other than by the production of a certified copy of articles of incorporation. After the passage of the act of March 3, 1887 (24 Stat. 477), which provided that no corporation, more than 20 per cent. of the stock of which was owned by persons not citizens of the United States, should acquire real estate in the territories of the United States or the District of Columbia, cor-

such a limitation. It is in that respect unlike grants of land for homesteads and settlement, indicating in such cases that the grant is intended only for individual citizens. The development of the mineral wealth of the country is promoted, instead of retarded, by allowing miners thus to unite their means. This is evident from the fact that so soon as individual miners find the necessity of obtaining powerful machinery to develop their mines, a corporation is formed by them, and it is well known that a very large portion of the patents for mining lands has been issued to corporations. * * * We are of opinion that * * * section 2319 of the Revised Statutes must be held not to preclude a private corporation formed under the laws of a state, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States. There may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer. It may, perhaps, be treated as one person, and entitled to locate only to the extent permitted to a single individual. That question, however, is not before us, and does not call for an expression of opinion." Field, J., in McKinley v. Wheeler, 130 U. S. 630, 32 L. ed. 1048, 9 Sup. Ct. 638. In Coalinga Hub Oil Co., 40 Land Dec. Dept. Int. 401, the land department holds that a corporation may not legally locate more than twenty acres in one placer location either in its own name or through individuals acting for it.

porations making application to patent mining claims in a territory were required to show that 80 per cent. of their stockholders were citizens of the United States. But this rule never prevailed under the mineral act of 1872 anywhere. It would have been a great hardship on a corporation to have had to prove that all of its stockholders were citizens of the United States. The practice in the land department of the United States under this statute should have great weight in construing it. Hahn v. U. S., 107 U. S. 402, 2 Sup. Ct. 494; U. S. v. Moore, 95 U. S. 760; Brown v. U S., 113 U. S. 568, 5 Sup. Ct. 648. Considering the statute and the practice thereunder, I think the citizenship of the stockholders of the Waterloo Mining Company was sufficiently established. It was not necessary to allege in the answer what was conclusively presumed from the facts alleged. Hence it was not necessary to have alleged in the answer that the stockholders of appellee were citizens of the United States.

With these views of the law in this case, I think the decree in this case should be affirmed, and it is so ordered. The decree is affirmed, with costs of appellee.

Section 3.—Infants and Agents.

THOMPSON AND OTHERS v. SPRAY.

1887. SUPREME COURT OF CALIFORNIA. 72 Cal. 528, 14 Pac. 182.

SUIT to quiet title by appellants, Alex. Thompson, Matilda Thompson, Margaret Thompson, Bedelia Thompson, James Thompson, and Alex. Thompson, Jr., a minor, by his guardian *ad litem*. * * *

HAYNE, C.[7] * * * Upon the close of the plaintiffs' evidence several motions for nonsuit were made and granted. * * * The defendant then moved for a nonsuit as to James, Matilda, and Alex. Thompson, Jr. This motion was denied as to Matilda, and granted as to the others. It was upon four grounds, viz.: That they were not citizens of the United States; that they were minors at the time of the [placer mining] location; that the use of their names was unauthorized; and that the notice was recorded before it was posted.

Were the plaintiffs citizens of the United States at the time the location was made? We think the evidence shows that they were. * * *

Does the fact that these plaintiffs were minors at the time of the location invalidate the notice as to them? We have not been referred to any decision which holds that it does. The provision of the statute is that mineral deposits in public lands are open to "citizens of the United States, and those who have declared their intention," etc.

[7] The statement of the complaint and parts of the opinion are omitted.

Section 2319. No requirement that the citizen shall be of any particular age is expressed; and, unless we are prepared to affirm that minors are not citizens, we do not see how we can say that they are not entitled to the benefit of the act. This conclusion is strengthened by the circumstance that in some instances the statute expressly requires that the citizen shall be of age. Thus, in reference to coal lands, the provision is that "every person above the age of twenty-one years who is a citizen of the United States," etc. Section 2347. So with reference to homesteads the provision is that "every person * * * over the age of twenty-one years, and a citizen," etc. Section 2259. The expression of a requirement as to age in some instances, and the omission of it in others, is significant. Nor is there any reason in the nature of things why a minor may not make a valid location. After the preliminary steps are taken, all that is required is that a certain amount of work shall be done. If the minor can do it, or can get any one to do it for him, the condition imposed by the statute is fulfilled. If he cannot, his claim lapses, and the mine is open to location by others. It may be added that, so far as we know, it is the practice, in many mining communities, for minors to locate claims.

Did the father's want of authority from his children invalidate the notice as to them? He testified as follows: "I had no power of attorney to sign the notice for my children, nor to authorize Mr. Price to sign their names. None of them gave me or him authority to sign their names. * * * I acted for them, but without their knowledge, until after their names were signed, notice recorded and posted." Unless there is an implication from the foregoing that he acted with their knowledge after their names were signed, etc., it does not appear that there was any ratification by all the children, except the bringing of the suit.

It cannot be doubted that the location of a mining claim may be made by agent, (*Gore* v. *McBrayer*, 18 Cal. 587); and wherever there is a local custom to that effect, it is not necessary that the person in whose name a location is made should be aware that it has been made, (*Morton* v. *Solambo Co.*, 26 Cal. 534). In the absence of evidence of such a custom, we think that there must be either authority in the first instance or a ratification. Whether a ratification will be presumed, in accordance with what is said in *Gore* v. *McBrayer*, above cited, and whether, if presumed or proven, it will relate back to the posting, so as to cut off intervening rights (compare *Hibberd* v. *Smith*, 67 Cal. 547, 4 Pac. Rep. 473, 8 Pac. Rep. 46), need not be decided; for the bringing of the suit, which must be taken to have been by authority, is a sufficient ratification; and, as far as the record goes, we cannot know that there were any intervening rights,—the assertions in the answer being denied by force of the statute, and the defendant not having introduced any evidence. * * *

We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

By the Court.—For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial.[8]

DUNLAP et al. v. PATTISON.

1895. Supreme Court of Idaho. 4 Idaho 473, 42 Pac. 504.

Action [in support of an adverse brought] by Rufus E. Dunlap and Archibald Smith against Moses Pattison. Judgment for plaintiffs, and defendant appeals. Reversed.

Morgan, C. J.[9]—* * * Thereupon the appellant offered in evidence a location notice, which was identified as the location notice of claim No. 9, which said notice was excluded by the court, for the reason that the claim was located in the name of John K. Waite by Moses Pattison, his attorney in fact, and was sworn to by Moses Pattison, instead of John K. Waite, the locator named in the notice; the court holding that nobody but one of the locators could make the affidavit; that, in the case before the court, John K. Waite was the locator, and the only locator. * * *

Section 3104 of the Revised Statutes of Idaho provides that "at the time of presenting a notice of location for record, or within five days thereafter, one of the locators named in the same must make and subscribe an affidavit in writing on or attached to the notice, in the following form, to wit: 'I, ——, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith, called the —— ledge; that the same has not to the best of my knowledge and belief been before located according to the laws of the United States and this territory, or, if so located, that the same has been abandoned or forfeited,'" etc.

It is contended on the part of appellant that the construction by the court of the literal language of the statute, requiring one of the locators named in the notice to make the foregoing affidavit, is too narrow. In the case of Schultz v. Keeler, 13 Pac. 481, this court held that a valid location of a mining claim could be made through an agent; and in Gore v. McBrayer, 18 Cal. 587, the court holds that "it is not necessary that a party should act personally in taking up a claim, or in doing the acts required to give evidence of the appropriation, or to perfect appropriation; and that such acts are valid if done by any one for him or with his assent or approval, and assent

[8] "Where a minor old enough to prospect and work locates a claim we do not see why his minority should invalidate his title, but the use of the names of minor children to obstruct creditors or for other sinister purpose should certainly be unable to resist attack in proper form." Morrison's Mining Rights, 14 ed., 70.

[9] Parts of the opinion are omitted.

will be presumed." In the above case the notice contained the name of the locator, as well as those for whom location was made. In Morton v. Mining Co., 26 Cal. 530, the court holds that a person may locate a mining claim in the name of himself and others named in the notice of location, and, when so located, title will be good in the others not present and having no notice of the location. One of several co-locators of a mining claim may cause a notice of a mining claim to be recorded in the name of himself and others not present, and the location will be good. Kramer v. Settle, 1 Idaho, 485. It will also be seen that section 3101, Rev. St., provides that the locator of any lode mining claim must, at the time of making the location, place a substantial stake or post, not less than four inches square, etc.; and yet this and every other act necessary to be done by the locator to make a valid location may be done by an agent, although the statute distinctly states that the locator must do these things. Further, the statute provides that the recorder must record the claims, and yet the recorder may do this by his deputy or agent, or by a mere clerk in the office, although the clerk may have neither power of attorney to act, nor even written authority of any kind, nor is it necessary that he be a sworn officer, and his acts are as valid as if performed by the recorder himself. The courts have repeatedly held that claims may be located by an agent, as well as by the principal. There would seem to be no reason why this affidavit might not be as well made by the agent as by the principal; in fact better, as, in case the claim was located by an agent, he would be the person acquainted with the facts necessary to be stated in the affidavit,—as "that he was acquainted with the mining ground described, that it had not been theretofore located, or that it had been abandoned." If the person named in the notice must, of necessity, make the affidavit, then such person must, before completing the location, go upon the ground in person to acquaint himself with the facts necessary to be stated in the affidavit. It is, and was when this law was passed, a well-known custom of the country to employ prospectors to go into the mountainous country and search for mines. These men ordinarily had no money, and money, provisions, horses, tools, and supplies of every kind were furnished by men who had the means to do so, but could not themselves go; but, if they must go to make this affidavit, then they might as well do the work. It will be seen that the narrow construction of this statute contended for would at once destroy the whole business of outfitting men to prospect for mines, by which means probably three-fourths of all the mines in the country were discovered. If the prospector inserts his own name in the notice of location as one of the locators, wherein does that change his relation to the others named in the notice? He must make the affidavit for them, as well as himself. If he can do this, why can he not make it wholly for them? The main thing required by the legislature (section 3104) is an affidavit that the party making it is acquainted

with the mining ground, that it has not been located, or, if located, has been abandoned. These are the important facts. Who makes the affidavit is not important, so he is acquainted with the facts. * * *

We think the construction given to the statute by the court below was never intended by the legislature, and that, as the location may be made as well by the agent or attorney in fact of the locator, so every act necessary thereto may also be performed by such agent or attorney, if the facts required are within his knowledge. Of course, the agency must be shown by sufficient evidence. Judgment and decree reversed. Costs awarded to appellant.

Section 4.—United States Mineral Surveyors and Other Officers, Clerks and Employees in the General Land Office.

WASKEY ET AL. v. HAMMER ET AL.

1912. SUPREME COURT OF THE UNITED STATES.
223 U. S. 85, 32 Sup. Ct. 187.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action of ejectment, the subject-matter of which was the overlapping portions of two placer mining claims in Alaska, one known as the Golden Bull and the other as the Bon Voyage. The plaintiffs claimed the area in conflict as part of the Golden Bull, and the defendants claimed it as part of the Bon Voyage. The facts, as they must be accepted for present purposes, are these:

In 1902 the Bon Voyage was located by J. Potter Whittren, he having previously made a discovery of placer gold within the ground which he included in the claim. Although not intended to be excessive, the claim embraced a trifle more than 20 acres, the maximum area permitted in a location by one person. In 1903 Whittren, upon ascertaining that fact, drew in two of the boundary lines sufficiently to exclude the excess, and in doing so left the point or place of his only prior mineral discovery outside the readjusted lines. Later in 1903, he made a discovery of placer gold within the lines as readjusted. At the time of drawing in the lines and making the subsequent discovery he was a United States mineral surveyor, but was not such at the time of the original location. In 1904 the Golden Bull was located by B. Schwartz, and included a part of the ground embraced in the Bon Voyage. Neither claim was carried to patent or entry, and when the action was begun the defendants were in possession. The plaintiffs other than Schwartz claimed under him, and

the defendants other than Whittren claimed under conveyances from him, made after 1904.

Upon the trial the court, at the instance of the plaintiffs, directed a verdict in their favor, substantially upon the following grounds, taken collectively: 1. A discovery of mineral within the limits of a mining claim is essential to its validity; 2. The original location of the Bon Voyage was invalidated by the readjustment of its lines whereby the point or place of the only prior discovery of mineral was left without those lines; 3. The readjusted location was invalid because, at the time of the discovery of mineral therein, Whittren, being a United States mineral surveyor, was disqualified to make a location under the mining laws. The jury returned a verdict as directed, judgment was entered thereon, the judgment was affirmed by the circuit court of appeals for the ninth circuit (95 C. C. A. 305, 170 Fed. 31), and the case is here upon certiorari (216 U. S. 622, 54 L. ed. 641, 30 Sup. Ct. Rep. 577).

Conceding that the unintentional inclusion of a trifle more than 20 acres in the Bon Voyage as originally located was an irregularity which did not vitiate the location, but merely made it necessary that the excess be excluded when it became known (Richmond Min. Co. v. Rose 114 U. S. 576, 580, 29 L. ed. 273, 274, 5 Sup. Ct. Rep. 1055; McIntosh v. Price, 58 C. C. A. 136, 121 Fed. 716; Zimmerman v. Funchion, 89 C. C. A. 53, 161 Fed. 859), we come to consider whether the location was invalidated when, by the readjustment of its lines, it was left without a mineral discovery therein. The mining laws, Rev. Stat. §§ 2320, 2329, U. S. Comp. Stat. 1901, pp. 1424, 1432, make the discovery of mineral "within the limits of the claim" a prerequisite to the location of a claim, whether lode or placer, the purpose being to reward the discoverer and to prevent the location of land not found to be mineral. A discovery without the limits of the claim, no matter what its proximity, does not suffice. In giving effect to this restriction, this court said, in Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482, that the loss of that part of a location which embraces the place of the only discovery therein is "a loss of the location." Possibly what was said went beyond the necessities of that case, critically considered, but it illustrates what naturally would be taken to be the effect of the statute; and as that view of it has been accepted and acted upon for twenty-five years by the Land Department and by the courts in the mining regions, it should not be disturbed now. It follows that when, in 1903, Whittren excluded from the Bon Voyage the only place at which mineral had been discovered therein, he lost the location. That his purpose was not to give up the location, but only to eliminate the excess in area, is immaterial, because, although free to exclude any other part of the claim and to retain that embracing the discovery, he excluded the latter, and thereby caused the location to be without a discovery within its limits. Possibly, as was

suggested in argument, the discovery was excluded because it was not deemed sufficiently promising to make its retention advisable, but, however that may have been, its exclusion defeated the location and left the lands therein "open to exploration and subject to claim for new discoveries." Ibid.

As no adverse right had intervened at the time of Whittren's subsequent discovery of mineral within the limits of the readjusted location, it must be conceded that that location became effective as of that time, just as if he had then marked those limits anew (2 Lindley, Mines, §§ 328, 330), unless he was then disqualified to make a location by reason of his having become a United States mineral surveyor; and so it is necessary to consider whether such a surveyor is within the prohibition of Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257, and, if so, whether that prohibition made the readjusted location void, or only voidable at the instance of the government. That section reads:

"The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

Mineral surveyors are appointed by the surveyor general under Rev. Stat. § 2334, and their field of action is confined to the surveying of mining claims and to matters incident thereto. They act only at the solicitation of owners of such claims, and are paid by the owners, not by the government; but their charges must be within the maximum fixed by the Commissioner of the General Land Office, and their work must be done in conformity to regulations prescribed by that officer. They are required to take an oath, and to execute a bond to the United States, as are many public officers. Within the limits of their authority they act in the stead of the surveyor general and under his direction, and in that sense are his deputies. The work which they do is the work of the government, and the surveys which they make are its surveys. The right performance of their duties is of real concern, not merely to those at whose solicitation they act, but also to the owners of adjacent and conflicting claims and to the government. Of the representatives of the government who have to do with the proceedings incident to applications for patents to mining claims, they alone come in contact with the land itself, and have an opportunity to observe its situation and character, and the extent and nature of the work done and improvements made thereon; and it is upon their reports that the surveyor general makes the certificate required by Rev. Stat. § 2325, which is a prerequisite to the issuance of a patent. See Mining Regulations of July 26, 1901, paragraphs 90, 115–169, 31 Land Dec. 474, 489, 493; Gowdy v. Kismet Gold Min. Co. 24 Land Dec. 191, 193. The *résumé* of their authority and duties, and of their relation to the surveyor general and the General Land Office, satisfies us that they are within the prohibition of § 452. That

prohibition is addressed not merely to the officers of the General Land Office, or to its officers and clerks, but to its "officers, clerks, and employees." These words, taken collectively, are very comprehensive, and easily embrace all persons holding positions under that office and participating in the work assigned to it, as is the case with mineral surveyors. The purpose of the prohibition is to guard against the temptations and partiality likely to attend efforts to acquire public lands, or interests therein, by persons so situated, and thereby to prevent abuse and inspire confidence in the administration of the public-land laws. So understanding the letter and purpose of the prohibition, we think it embraces the location of a mining claim by a mineral surveyor. True, it is addressed to officers, clerks, and employees *"in* the General Land Office," and is directed against "the *purchase* of any of the public land" by them; but in view of the terminology common to public-land legislation, we think the reference to the General Land Office is inclusive of the subordinate offices or branches maintained under its supervision, such as the offices of the surveyors-general and the local land offices, and that the term "purchase" is inclusive of the various modes of securing title to or rights in public lands under the general laws regulating their disposal.

That the construction which we here place upon § 452 is the one prevailing in the Land Department is shown in its circular of September 15, 1890, 11 Land Dec. 348, wherein it is said: "All officers, clerks, and employees in the offices of the surveyors general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering or becoming interested, directly or indirectly, in any of the public lands of the United States." The published decisions of the Secretary of the Interior, although disclosing instances in which that construction has been departed from or doubted (Dennison and Willets, 11 Copp's L. O. 261; Lock Lode, 6 Land Dec. 105; Re Leffingwell, 30 Land Dec. 139), show that in the main it has been closely followed (Re McMicken, 10 Land Dec. 97, and 11 Land Dec. 96; Muller v. Coleman, 18 Land Dec. 394; Re Neill, 24 Land Dec. 393; Floyd v. Montgomery, 26 Land Dec. 122, 136; Re Maxwell, 29 Land Dec. 76; Re Baltzell, 29 Land Dec. 333; Re Bradford, 36 Land Dec. 61).

In principle, the recent case of Prosser v. Finn, 208 U. S. 67, 52 L. ed. 392, 28 Sup. Ct. Rep. 225, goes far to sustain the view here expressed. There a special agent of the General Land Office, whose field of duty was in the state of Washington, made an entry of public land under the timber-culture law, and thereafter in all respects complied with that law. But it was held by this court that he was, in every substantial sense, an employee in the General Land Office, and therefore was within the prohibition of § 452.

The general rule of law is that an act done in violation of a statu-

tory prohibition is void and confers no right upon the wrongdoer; but this rule is subject to the qualification that when, upon a survey of the statute, its subject-matter and the mischief sought to be prevented, it appears that the legislature intended otherwise, effect must be given to that intention. Miller v. Ammon, 145 U. S. 421, 426, 36 L. ed. 759, 762, 12 Sup. Ct. Rep. 884; Burck v. Taylor, 152 U. S. 634, 649, 38 L. ed. 578, 583, 14 Sup. Ct. Rep. 696; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 548, 46 L. ed. 679, 685, 22 Sup. Ct. Rep. 431. Here we think the general rule applies. The acts described in § 452 are expressly prohibited under penalty of dismissal. There is in its language nothing indicating that its scope is to be confined to the exaction of that penalty (Prosser v. Finn, supra), or that acts done in violation of it are to be valid against all but the government. Nor is there anything in its subject-matter or in the mischief sought to be prevented which militates against the application of the general rule. On the contrary, it is reasonably inferable, from the language of the section and the situation with which it deals, that it is intended that violations of it shall be attended by the ordinary consequences of unlawful acts. We therefore are of opinion that the readjusted location was void.

Affirmed.[10]

Section 5.—Accommodation Locators.

RIVERSIDE SAND & CEMENT MFG. CO. v. HARDWICK ET AL. (two cases).

1911. Supreme Court of New Mexico. 120 Pac. 323.

Parker, J.[11]—The Riverside Sand & Cement Manufacturing Company, appellee, brought an action of ejectment to recover the possession of a placer mining claim, called the "Chiefton No. 1," resulting in a verdict and judgment for the possession of only a portion of the same. The appellants, Eugene F. Hardwick and others, the defendants below, took an appeal to this court. The plaintiff below and appellee here also sued out a cross-appeal from the judgment. Both of these appeals will be considered together. * * *

[7] 5. In the tenth assignment, it is urged that, because when the Chiefton No. 1 was located a portion of the ground was being worked by other persons, the location was therefore unwarranted. The principle that no valid location can be made of land in the actual

[10] The question is one of the effect of the illegality. It is believed that a decision establishing a rule like that applicable to locations by aliens is needed for the protection of innocent purchasers and would be more in accord with the spirit of the American mining law.

[11] Parts of the opinion are omitted.

adverse possession of another is invoked, and the principle is not disputed by counsel for appellee. It does not appear, however, that the entry was by way of intrusion upon the actual possession of another. Who and what these persons were who were working the ground, whether they made any claim to the same, or had any rights therein, does not appear. The location of appellants bears no relation to them or other persons on the ground, so far as appears. Under such circumstances, the principle invoked can have no application. * * *

[9] 7. Appellee, upon its cross-appeal, complains of the rulings and instructions of the court which permitted appellants to submit to the jury the question as to whether two of the locators of the Chiefton No. 1 placer claim, under which appellee claims, were not mere accommodation locators, having no interest in the location, and conveying without consideration to the appellee. The objection is based upon two grounds: First, it is urged that such an issue is not within the pleadings; and, second, that the fact, if true, of the use of two persons as "dummies" in the location of the Chiefton No. 1 is not available to appellants, and is a matter in which the government alone is interested, and of which it alone can take advantage. Appellants seek to justify the action of the court in submitting the question to the jury upon the authority of Durant v. Corbin (C. C.), 94 Fed. 382; Gird v. Cal. Oil Co. (C. C.) 60 Fed. 531, and Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164. In the first two cases, there was an application for patent, and the actions were in support of adverse claims. This fact, doubtless, was overlooked by the trial court, and the distinction between that class of cases and ordinary contests between individuals was overlooked. The case of Mitchell v. Cline, supra, was a case where, after a patent, a suit for partition was instituted, and it was sought to charge one of the entrymen, as trustee for the benefit of the others, as to a portion of the title. The court held that, as all of the entrymen had perpetrated a fraud upon the government by the use of "dummies" in making the location, a court of equity would refuse relief, and would leave the parties where it found them, all in accordance with a well-recognized equitable principle. This case, as well as the case of Gird v. Cal. Oil Co., supra, and many other cases, point out that the fraud of locating by means of dummies is a fraud upon the government, and not upon the citizen who might wish to locate. The fraud being a fraud upon the government, it would seem clear that the government alone can complain. 1 Lindley on Mines, § 450. The question as to how advantage can be taken of the disqualification of a locator has often arisen in connection with locations by aliens. Some earlier cases admitted the relevancy of the question of citizenship, but the law has been finally settled that the government alone is concerned, and the same is not relevant in a contest between individuals, except in adverse proceedings, wherein the government is a silent party. 1 Lindley on Mines,

§ 234; McKinley Creek Mining Co. v. Alaska Un. Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. ed. 331; Tornanses v. Melsing, 109 Fed. 710, 47 C. C. A. 596; Wilson v. Triumph Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 716. It follows that the trial court was in error in submitting to the jury the question of the qualification of the lolators of the Chiefton No. 1.

Appellee moved for judgment non obstante veredicto, which should have been granted. This court, however, has the power to enter judgment, and the same will now be entered for the possession of all of the Chiefton No. 1 placer mining claim, as described in the record. And it is so ordered.[12]

[12] But see Cook v. Klonos, 164 Fed. 529 and Nome & Sinook Co. v. Snyder, 187 Fed. 385.

In Cook v. Klonos, 164 Fed. 529, which was a suit to quiet title to a group placer mining claim, and for an injunction, Morrow Circuit Judge, for the court, pointed out that "the prohibition contained in section 2331 [Rev. St. U. S.] against the location of 'more than twenty acres for each individual claimant,' is direct and positive, and limits the amount of ground that any one claimant may appropriate, either individually or in association claim, at the time of the location" (164 Fed. 537), and concluded:

"The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed but [because an undivided half interest in the 120-acre placer claim is really equivalent to 60 acres of it], in excess of the limit of 20 acres, [allowed to any one locator], it is plainly in violation of the letter of the law, and when, as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void." (164 Fed. 538–539.)

In Nome & Sinook Co. v. Snyder, 187 Fed. 385, which was an action of ejectment in support of an adverse, Wolverton, District Judge, for the court, said:

"Any scheme or device entered into whereby one individual is to acquire more than that amount or proportion in area constitutes a fraud upon the law and consequently a fraud upon the government, from which the title is to be acquired, and any location made in pursuance of such a scheme or device is without legal support and void. * * *

"Now, in the case under review, the very articles of agreement put the claimant beyond the pale of the law, while the testimony establishes the illegality of the scheme beyond peradventure. The location, although made in the name of the association, two of the parties thereto were to have but a nominal interest in the claim, one less than one-fifth, one largely more than one-fifth, and one more than one-half, giving the latter, of course, more than 50 acres proportionately in the claim. So that, regardless of the discovery, regardless of the marking on the ground, or even the assessment work, the claim was void, and could not avail the locators in any stage. The location being void, the ground remained as if none had been made, and was unappropriated mineral land, subject to location by others." (187 Fed. 388, 389.)

See note 10, ante.

CHAPTER III.

THE DISCOVERY OF LODE AND PLACER CLAIMS.

FEDERAL STATUTE.

Sec. 2320. * * * But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * * Rev. St. U. S. § 2320.

Section 1.—Rights Prior to Discovery.

(a) *Pedis Possessio.*

ERHARDT v. BOARO AND OTHERS.

1885. SUPREME COURT OF THE UNITED STATES.
113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. 560.

In Error to the Circuit Court of the United States for the District of Colorado.

This is an action for the possession of a mining claim in Pioneer mining district, in the county of Dolores, and state of Colorado. The claim is designated by the plaintiff as "The Hawk Lode" mining claim, and by the defendants as "The Johnny Bull Lode" mining claim. The plaintiff is a citizen of New York, and the defendants are citizens of Colorado. The complaint is in the usual form in actions for mining claims under the practice in Colorado. * * *

On the trial the plaintiff produced evidence tending to show that on the seventeenth of June, 1880, one Thomas Carroll, a citizen of the United States, while searching, on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral, discovered, on vacant unoccupied land of the public domain of the United States, in the Pioneer mining district mentioned, the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities; that by an agreement between him and the plaintiff, pursuant to which the explorations were prosecuted, all lodes and veins discovered by him were to be located, one-fifth in his name

and four-fifths in the name of the plaintiff; that on the day of his discovery Carroll designated the vein or lode as the "Hawk Lode," and posted at the point of discovery a plain sign, or notice in writing, as follows:

"HAWK LODE.

"We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein, or deposit.

"*Dated June* 17, 1880. JOEL B. ERHARDT, 4-5ths.
"THOMAS CARROLL, 1-5th."

—That on the same day, at the point of his discovery, Carroll commenced excavating a discovery shaft, and sunk the same to the depth of about eighteen inches or two feet on the vein; that on the thirtieth of the month, in the temporary absence of himself and the plaintiff, the defendant Boaro, with knowledge of the rights and claims of the plaintiff and Carroll, entered upon and took possession of their excavation, removed and threw away or concealed the stake upon which their written notice was posted, and, at the point of Carroll's discovery of the vein or lode, erected a stake and posted thereon a discovery and location notice as follows:

"JOHNNY BULL LODE.

"We, the undersigned, claim 1,500 feet on this mineral-bearing vein or lode, running six hundred feet north-east and nine hundred feet south-west, and 150 feet on each side of the same, with all its dips and spurs, angles, and variations.

"*June* 30, 1880. ANTHONY BOARO.
"W. L. HULL."

The evidence also tended to show that Boaro and Hull entered upon the premises thus described, about July 21, 1880, and remained thereafter continuously in possession; that threats of violence to the plaintiff and Carroll, if they should enter upon the premises, or attempt to take possession of them, were communicated to Carroll as having been made by Boaro early in August following; that in consequence of such threats, and the possession held by Boaro, Carroll was prevented from resuming work upon and completing the discovery shaft, and from entering upon any other part of the lode or vein, and performing the acts of location required by law within the time limited. The evidence also tended to show that within 90 days from the discovery of the lode by Carroll, one French, on behalf of the plaintiff and Carroll, secretly caused the boundaries of the claim to be marked by six substantial posts, so as to include the place of discovery and the premises in controversy, and filed in the office of the recorder of the county a location certificate setting forth the name

of the lode, the date of the location, the names of the plaintiff and Carroll as locators, and the course of the lode or vein; and giving such a description of the claim, with reference to natural objects and permanent landmarks, as would suffice to identify the same with reasonable certainty.

The evidence offered by the defendants tended to rebut that of the plaintiff. * * *

The evidence being closed, the court was, among other things, requested to instruct the jury that from and after the date of the discovery by a citizen of the United States, upon vacant, unoccupied mineral lands, of the outcrop of a vein or body of mineral-bearing rock, the discoverer is entitled to the possession of the point at which he made his discovery, and of such a reasonable amount of adjacent ground as is necessary or incidental to the proper prosecution of the work of opening up or exposing the vein or body of mineral-bearing rock to the depth and within the time required by law, and that to such extent he is protected by law in his possession for the period of 60 days from the date of his discovery. But the court refused to give this instruction, and the plaintiff excepted to the refusal. The court charged the jury, among other things, that it was in evidence, and seemed to be conceded, that the notice on the stake put up by Carroll contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom, and "in this respect," said the court, "the notice was deficient, and under it the locators could not claim more than the very place in which it was planted. Elsewhere on the same lode or vein, if it extended beyond the point in controversy, any other citizen could make a valid location; for this notice, specifying no bounds or limits, could not be said to have any extent beyond what would be necessary for sinking a shaft;" and also, that to entitle the plaintiff to recover, "it should appear from the evidence that Boaro entered at the very place which had been taken by Carroll, because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted." To the giving of these instructions the plaintiff also excepted. The defendant obtained a verdict, and to review the judgment entered thereon the plaintiff brings the case here on writ of error.

FIELD, J.[1]—As seen by the statement of the case, the court below, in its charge, assumed that the notice on the stake, placed by Carroll at the point of his discovery, contained no specification or description of the ground claimed by the locators, because it did not designate the number of feet claimed on each side of that point, or in any direction from it. The court accordingly instructed the jury that the notice was deficient, and under it the locators could not claim any

[1] Parts of the statement of facts are omitted.

more than the very place in which the stake was planted, and that elsewhere on the same lode beyond the point of discovery any other citizen could make a valid location. In this instruction we think the court erred. The statute allows the discoverer of a lode or vein to locate a claim thereon to the extent of 1,500 feet. The written notice posted on the stake at the point of discovery of the lode or vein in controversy, designated by the locators as "Hawk Lode," declares that they claim 1,500 feet on the "lode, vein, or deposit." It thus informed all persons, subsequently seeking to excavate and open the lode or vein, that the locators claimed the whole extent along its course which the law permitted them to take. It is, indeed, indefinite in not stating the number of feet claimed on each side of the discovery point; and must, therefore, be limited to an equal number on each side; that is, to 750 feet on the course of the lode or vein in each direction from that point. To that extent, as a notice of discovery and original location, it is sufficient. Greater particularity of description of a location of a mining claim on a lode or vein could seldom be given until subsequent excavations have disclosed the course of the latter. These excavations are to be made within 60 days after the discovery. Then the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and, within one month thereafter, that is, within three months from the discovery, a certificate of the location must be filed for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode, and such a description of the claim, by reference to some natural object or permanent monument, as will identify it with reasonable certainty. Rev. St. § 2324; Gen. Laws Colo. §§ 1813, 1814.

But during the intermediate period, from the discovery of the lode or vein and its excavation, a general designation of the claim by notice, posted on a stake placed at the point of discovery, such as was posted by Carroll, stating the date of the location, the extent of the ground claimed, the designation of the lode, and the names of the locators, will entitle them to such possession as will enable them to make the necessary excavations and prepare the proper certificate for record. The statute of Colorado requires that the discoverer, before a certificate of location is filed for record, shall, in addition to posting the notice mentioned at the point of discovery, sink a shaft upon the lode to the depth of at least 10 feet from the lowest part of such shaft under the surface, or deeper, if necessary, to show a defined crevice and to mark the surface boundaries of the claim. Before this work could be done by the plaintiff and his co-locator, the ground claimed by them was taken possession of by the defendants, the stake at the point of discovery, upon which the notice was posted, was removed, and Carroll was thereby, and by threats of violence,

prevented from re-entering upon the premises and completing the work required to perfect their location and prepare a certificate for record; at least, the evidence tended to establish these facts. If they existed,—and this was a question for the jury,—the plaintiff was entitled to recover possession of the premises. To the extent of 750 feet on the course of the lode on each side from the point of discovery, he and his co-locator were entitled to protection in the possession of their claim. They did not lose their right to perfect their location, and perform the necessary work for that purpose, by the wrongful intrusion upon the premises, and by threats of violence if they should attempt to resume possession. As against the defendants, they were entitled to be reinstated into the possession of their claim. They could not be deprived of their inchoate rights by the tortious acts of others; nor could the intruders and trespassers initiate any rights which would defeat those of the prior discoverers.

The government of the United States has opened the public mineral lands to exploration for the precious metals, and, as a reward to the successful explorer, grants to him the right to extract and possess the mineral within certain prescribed limits. Before 1866 mining claims upon the public lands were held under regulations adopted by the miners themselves in different localities. These regulations were framed with such just regard for the rights of all seekers of the precious metals, and afforded such complete protection, that they soon received the sanction of the local legislatures and tribunals; and, when not in conflict with the laws of the United State, or of the state or territory in which the mining ground was situated, were appealed to for the protection of miners in their respective claims, and the settlement of their controversies. And although since 1866 congress has to some extent legislated on the subject, prescribing the limits of location and appropriation, and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States or of the state or territory, in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. Rev. St. § 2324. In all legislation, whether of congress, or of the state or territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development, by working, as the condition of continued ownership until a patent is obtained. And whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made, so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal. Otherwise, the whole purpose of allowing the free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in

the struggle for possession, instead of previous discovery, would determine the rights of claimants.

It does not appear, in this case, that there were any mining regulations in the vicinity of the "Hawk Lode" which affect in any respect the questions involved here. Had such regulations existed they should have been proved as facts in the case. We are therefore left entirely to the laws of the United States and the laws of Colorado on the subject. And the laws of the United States do not prescribe any time in which the excavations necessary to enable the locator to prepare and record a certificate shall be made. That is left to the legislation of the state, which, as we have stated, prescribed 60 days for the excavations upon the vein from the date of discovery, and 30 days afterwards for the preparation of the certificate and filing it for record. In the judgment of the legislature of that state this was reasonable time. This allowance of time for the development of the character of the lode or vein, does not, as intimated by counsel, give encouragement to mere speculative locations; that is, to locations made without any discovery or knowledge of the existence of metal in the ground claimed, with a view to obtain the benefit of a possible discovery of metal by others within that time. A mere posting of a notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the minor to authorize him to make a location which will exclude others from the ground, such as the discovery of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. Then protection will be afforded to the locator to make the necessary excavations and prepare the proper certificate for record. It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject.

This case, as appears by the record, is brought in the name of one of the locators, Erhardt, who owns only four-fifths of the claim. But, as a tenant in common with Carroll, he can maintain an action of ejectment for the possession of the premises, the recovery being not merely for his benefit, but for that of his co-tenant, who is equally entitled with him to the possession.

It follows from what we have said that the judgment of the court below must be reversed, and the case remanded for a new trial; and it is so ordered.

GEMMEL v. SWAIN ET AL.

1903. SUPREME COURT OF MONTANA. 28 Mont. 331, 72 Pac. 662.

SUIT by George Gemmel against John Swain and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was commenced in the district court by the appellant, who was plaintiff below, to secure an injunction restraining the defendants from entering upon, sinking shafts, running tunnels, discovering or attempting to discover veins of mineral in, certain designated lands. The complaint alleges that on December 19, 1899, a portion of section 17, township 3 N., range 7 W., to the extent of 20 acres, was vacant, uninclosed, and unimproved mineral lands of the United States; that on that date the plaintiff, having reason to believe and believing that veins or lodes of rock in place, bearing gold, silver, copper, and other precious metals, existed therein, entered upon the above-described land for the purpose of prospecting for and making discovery of such veins, and of locating the ground; that he proceeded to sink three shafts, but, before he made discovery of any such veins or lodes, he was enjoined by the district court, in an action entitled "Harley et al. v. M. O. P. Co. et al.," from further prosecuting his search; that he then posted at each of said shafts a written notice that he claimed the ground about each shaft to the extent of 750 feet east, 750 feet west, 300 feet north, and 300 feet south from the point where the notice was posted; that the plaintiffs in that action then immediately went upon the land, and commenced work for the purpose of making discovery of veins containing such precious metals, and of locating the ground. The plaintiff sought an injunction restraining the defendants from further proceeding with such work. An order to show cause and a temporary restraining order were issued, but, before a hearing was had upon the order to show cause, the defendants Harley, Butte & Boston Company, and Boston & Montana Company filed a demurrer to the complaint, which was by the court sustained; and, the plaintiff refusing to amend, the restraining order was dissolved, an injunction refused, and a judgment for costs entered against the plaintiff, from which this appeal is taken.

HOLLOWAY, J. (after stating the facts).—The only question for determination is whether the complaint states facts sufficient to entitle the plaintiff to an injunction. The complaint, upon its face, shows that the land in dispute was vacant, uninclosed, and unimproved mineral land of the United States; that the plaintiff went upon it, and was prospecting for veins of mineral-bearing rock, when he was enjoined. He had made no discovery, and consequently no location had been made, and none could be, for a location can rest only upon an actual discovery of such vein or lode. Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714; section 2320, Rev. St. U. S. [U.

S. Comp. St. 1901, p. 1424]. He was simply a prospector upon the public domain, with the bare, naked possession of the ground immediately about the three shafts where he was prosecuting his work. His possession was only such as is characterized in the law as possessio pedis, and could not be enlarged to include the entire 20-acre tract, or the whole amount of ground which he might have claimed under one or more quartz locations. Until discovery is made, no right of possession to any definite portion of the public mineral lands can even be initiated. Until that is done, the prospector's rights are confined to the ground in his actual possession, and until that possession is disturbed no right of action accrues, and even then no injunction would issue to restrain a mere trespass—certainly not in the absence of some showing of irreparable injury or the insolvency of the trespasser.

No contention is made that the work done by the defendants in prospecting this ground was done in or about any one of the shafts where plaintiff was prosecuting his work when enjoined, or that the work done by the defendants in any manner interfered with the work done by the plaintiff. The fact that plaintiff posted a notice at each of his shafts did not create any new right in him, or enlarge the right he already had. A notice of location (for such these notices purported to be) posted upon mineral land before discovery is made is an absolute nullity. Upton v. Larkin, 5 Mont. 600, 6 Pac. 66; section 2320, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1424]. The mere fact that the plaintiff was enjoined from continuing his work, and that, too, wrongfully, as determined by this court (Harley v. M. O. P. Co., 71 Pac. 407), did not alter the relative rights of the parties, or entitle the appellant here to an injunction in this action. Competing prospectors cannot make use of the writ of injunction to secure priority of discovery or location on, or apparent superiority of right to, a mining claim.

We are of the opinion that the complaint does not state facts sufficient to entitle the appellant to an injunction, and that the district court committed no error in sustaining the demurrer. The judgment is affirmed. Affirmed.

WEED ET AL. v. SNOOK ET AL.

1904. SUPREME COURT OF CALIFORNIA. 144 Cal. 439, 77 Pac. 1023.

ACTION by F. F. Weed and others against Walter Snook and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

COOPER, C.[2]—This action was brought by plaintiffs to quiet title to the south half of the northeast quarter of section 12, T. 11 N., R. 4

[2] Parts of the opinion are omitted.

W., S. B. M. The case was tried before the court, and findings filed, upon which judgment was entered for defendants. Plaintiffs made a motion for a new trial, which was denied, and bring this appeal from the order.

The facts are fully found, and * * * the case on the merits involves the single proposition as to whether or not the facts are such as to support the judgment and order. * * * The plaintiffs and defendants all claim under locations made or claimed to have been made of the land as mineral land. The mineral claimed and conceded to exist in the land is oil. Under Act Cong. Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434], the location and sale of oil land is governed by the mineral laws of the United States applicable to the location and sale of placer mining claims. The questions material to the decision of this case do not involve the marking of the locations, nor the posting of notices, but the validity of the locations of the respective parties as to their respective dates and the discovery of oil in the land. It may be stated preliminarily that oil was not discovered, under either location, until found by sinking or driving a well down to the sand. The mere finding of surface indications, such as seepage of oil, is not ordinarily sufficient. Oil must have been discovered within the limits of the claim. Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Miller v. Chrisman, 140 Cal. 446, 73 Pac. 1083, 74 Pac. 444. The facts and dates as to the respective locations and discoveries in and to the 80 acres in contest are substantially as follows: On January 20, 1900, defendants Walter Snook, John Snook, Maria B. Snook, E. A. Baer, W. L. Dixon, G. J. Plantz, F. N. Sawyer, and R. Frizelle, each being a citizen of the United States, made a location and marked the boundaries of a consolidated placer mining claim called the "Pacific Placer Mining Claim," which location included the land in contest. On the 10th day of April, 1900, William Carter, G. E. Squires, and C. J. Harvey, three of the plaintiffs, together with one Ross, each being a citizen of the United States, located a mining claim consisting of the north half of the southeast quarter of said section, being the 80 acres of land south of the land in contest, and known as "Ohio No. 1 Placer Claim." On the 23d day of May, 1900, the said locators of the north half of the southeast quarter of said section, including three of the plaintiffs, conveyed to the Lion Oil Company, a corporation, 10 acres of the said 80 located by them. The said Lion Oil Company proceeded to develop the 10 acres conveyed to it, and in October, 1900, had driven a well 750 feet deep, and discovered oil therein. This discovery completed and validated the location of the said north half of the southeast quarter of said section. At this time the defendants had not succeeded in discovering oil, and thus perfecting their location of the south half of the northeast quarter of said section. On November 28, 1900, before there was any conflict as to the land in contest,

the Vesuvius Oil Company, a corporation, having leased from and through defendants the said lands, went into actual possession thereof, and began the active work of preparing to drill a well therein for the discovery of oil. At this time there was still no conflict as to the land in contest, and neither plaintiffs nor any one else other than defendants were claiming any interest in or possession to the said lands so leased to the Vesuvius Oil Company. On the 24th day of December, 1900, while the said Vesuvius Oil Company was in the quiet and peaceable possession of the lands in contest, and erecting its buildings, derricks and machinery thereon for the purpose of drilling for oil, the plaintiffs, without permission of defendants, made out a notice in due form for a consolidated placer mining claim for the south half of the northeast quarter and the north half of the southeast quarter, being the lands embraced in both the prior locations, the Ohio No. 1 placer claim and the Pacific placer claim. The plaintiffs were citizens of the United States, and entitled to locate mineral lands. They properly marked the location of the claim so as to indicate its boundaries, and posted a notice upon the same, claiming it as "Lion No. 1 Placer Claim." At the time of so attempting to locate the entire 160 acres, the plaintiffs had made no discovery of oil or mineral in the south half of the northeast quarter, nor had they attempted to do so, and the claim to the north half of the southeast quarter had been perfected by the discovery of oil therein on the 10 acres conveyed to the Lion Oil Company. They have never entered upon the land in contest, nor discovered oil thereon; the only discovery being that made by the Lion Oil Company as aforesaid. On December 27, 1900, the Vesuvius Oil Company commenced the work of drilling a well upon the land in contest. On January 15, 1901, while the said lessee of defendants was in possession of the land in contest, and had expended a large amount of money in machinery and labor, and was so engaged in drilling for oil on the premises, the plaintiffs commenced this action. In February, 1901, the said Vesuvius Oil Company discovered oil in the said well so drilled by it on said land, and at the time of the trial of this action had expended for machinery, building, and drilling for oil the sum of about $10,000.

Upon the above facts defendants were entitled to judgment. The plaintiffs must rely upon the strength of their own title. They have not expended money nor entered upon the development of the lands in contest. They have made no discovery of oil thereon. They have merely posted notices and marked the boundaries of the land in connection with the south 80 acres, which they, or at least three of them, had already located. The discovery of oil had been made upon this south 80 acres, but the plaintiffs here cannot claim such discovery as being a discovery upon the land in contest. The claim of appellant that the prior discovery on the south 80 can be availed of for the purpose of making a consolidated filing upon the whole 160 acres

cannot be upheld. If such be the law, eight parties might locate 20 acres each of a quarter section, and each begin the work of putting in machinery and drilling on his 20 acres. It is at once apparent that the first discovery of oil by either of the parties would depend upon many circumstances, such as the means of the party, his experience, the kind of land or rock through which he must drive his well. Some one of the eight would be the first to discover oil. Could such party then get seven others, and relocate his claim, with the entire 160 acres, as a consolidated claim, and thus claim the first discovery as to the entire 160 acres, and obtain title thereto to the exclusion of the seven other original locators? Such course cannot be sanctioned by the courts. It would lead to strife, riots, and the shedding of blood. And yet such is, in principle, the claim of the plaintiffs in this case.

The statutes and mining laws of the United States do not contemplate the forcible or clandestine entry and location of lands in the peaceable possession of other parties, who have located the same in good faith, and who are endeavoring to secure their claims. Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 680[3]; Miller v. Chrisman, 140 Cal. 449, 73 Pac. 1085. * * * The correct rule is stated in Miller v. Chrisman, supra: "One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. * * * They [the locators] have, then, this right

[3] "It is true that upon mineral land of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and aboveboard, and made in good faith. Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is alseep in his cabin, or temporarily absent from his claim." Ross, Circuit Judge, in Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 680, 681.

"But every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. * * * Any other rule would make the wrongful occupation of public land by a trespasser superior in right to a lawful entry of it under the acts of congress by a competent locator." Sanborn, J., in Thallman v. Thomas, 45 C. C. A. 517, 111 Fed. 277, 279.

"Mere naked possession must yield to the higher right acquired by one who has connected himself with the government." Brantly, C. J., in Ferris v. McNally, — Mont. —, 121 Pac. 889, 891.

of possession, and with it the right to protect their possession against all illegal intrusions, and to work the land for the valuable minerals it is thought to contain. We cannot conceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery." * * * And we regard the law as settled that, while a locator, who has made his location, is engaged, in good faith, in prospecting it for minerals, and complies with the laws as to expenditures, and is in possession, the land is not open for location by others. In case of petroleum lands the discovery cannot, in most cases, be made except by considerable labor and expense in sinking wells. In making the location the locator necessarily takes into consideration surface indications, geological formations, proximity to known mines or wells producing oil. He must make his location in good faith, and use proper diligence to make discovery of oil. If he does not do so, he will lose his rights, under his location, as to parties who may afterwards in good faith acquire rights. But where the locator is in possession under his location, and is actively at work through his lessees or otherwise, and expending money for the purpose of discovering oil, his rights cannot be forfeited to third parties who attempt to make locations under such circumstances. The law must be given a liberal and equitable interpretation with a view of protecting prior rights acquired in good faith.

We advise that the order be affirmed.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

HANSON ET AL. v. CRAIG ET AL.

1909. CIRCUIT COURT OF APPEALS. 95 C. C. A. 338, 170 Fed. 62.

On Rehearing.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge.—Not being satisfied with our decision heretofore rendered in this case (161 Fed. 861, 89 C. C. A. 55), the petition for a rehearing of the cause was granted, and after a further consideration of the record we are convinced that the decision then made was erroneous. The theory upon which we then proceeded was that the evidence was sufficient to justify a finding of such a possession of the mining ground in question by the defendants in error, who were the plaintiffs below, as precluded the plaintiffs in error, who were defendants below, from entering upon it for the purpose of prospecting and making a valid mining location thereon. Some

of the facts are stated in the opinion then delivered, but there are other facts shown by the record which were overlooked.

The plaintiffs in error, as well as the defendants in error, are eight in number, and made the location under which they respectively claim as an association claim of 160 acres of placer ground. The location of the defendants in error was prior in point of time, having been made on the 5th day of January, 1906; the ground then staked by them being 1,320 feet wide by a mile long, on Wildcat Creek, a tributary of Treasure Creek, in the Fairbanks mining district of Alaska. That claim was called the "Red Dog Association Claim." On the 18th of the next month the defendants in error changed the boundaries of the claim, so as to lessen the width one-half and to double the length, and marked the boundaries thereof so that they could be readily traced upon the ground, and thereafter recorded the notice of such location. The record shows that the defendants in error had various other association claims of 160 acres each in the near vicinity and had a camp not far away. The evidence tended to show that on the 12th of March, 1906, the defendants in error made arrangements to commence sinking a shaft upon the ground thus claimed in search of gold, and with that end in view it was arranged that the defendant in error Cale should go to Fairbanks, which was about 18 miles distant, to procure the necessary tools, blankets, and other supplies, and to return to the claim and commence work thereon on the 16th of March, 1906, and that in the meantime the defendant in error Carroll and one Hugh Dougherty as the representative of the defendant in error Alice Dougherty, should begin the sinking of a shaft on the claim, which they did on the 14th of March, 1906, continuing such work during the 14th and a part of the 15th of that month, during which time they sunk the hole to a depth of about six feet. It appears that in the evening of March 15th Carroll and Dougherty left the claim, taking with them their tools and other belongings, for the reason that Cale was expected to return from Fairbanks, under the arrangement, and proceed with the work thereon the next morning, and also assigned as a reason that until the shaft had been sunk a sufficient distance but one man could work therein. It appears from the testimony that Cale selected the place on the 12th of March for the sinking of this shaft; that witness testifying:

"I told Mr. Carroll and Mr. Dougherty on the evening of the 12th that they could go to work and commence sinking a shaft immediately, and that I would leave in the morning and go to Fairbanks Creek, and that it would not take me to exceed three days to get back; that I would be back on the third day if nothing intervened—nothing interfered with me—which they agreed to do. I had a similar conversation with them on the morning of the 13th, when leaving. That was the understanding, that they would go up in the morning and commence work on this shaft on this ground; and I left on that morning."

There was also testimony going to show that Cale returned to within one mile of the Red Dog association claim on the 18th of March, with his tools and supplies, but, instead of going onto the ground and commencing work, stopped at the camp of the defendant in error Carroll, and from there went back to Fairbanks Creek, and did not return to the ground in dispute until the afternoon of the 21st of March, when he went to work in the shaft or hole that had been commenced on the 14th of the month by Carroll and Dougherty; Cale testifying:

"I immediately went to work, and remained working until the shaft was sunk to bedrock. I worked alone for a while, until I got the shaft down as far as I could get it and throw the dirt out. Then I went to work and timbered the shaft, and made a windlass and a few other things that were necessary to continue the work, and I then got Mr. Warren [being one of the defendants in error] to help along in finishing the shaft, sinking it to bed rock [and that in sinking the shaft he made a discovery of gold]."

This discovery of gold, however, was subsequent to the location which was made by the plaintiffs in error on the 16th day of March, 1906, of a claim called "Try Again Association Claim," which location included a part of the ground covered by the Red Dog association claim. The plaintiffs in error so marked the boundaries of the Try Again association claim as that they could be readily traced upon the ground, and commenced sinking a shaft upon that portion of it which overlapped the Red Dog association claim of the defendants in error, and continuously prosecuted their work until they made a discovery of gold thereon on the 15th day of April, 1906, up to which time the defendants in error had not made any discovery of mineral within the boundaries of the Red Dog association claim.

Since the statute of the United States requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim (Rev. St. §§ 2320, 2329 [U. S. Comp. St. 1901, pp. 1424, 1432]), the real question for decision in this case is whether the defendants in error had such possession of the Red Dog association claim as precluded the plaintiffs in error from entering upon the ground and making their location of March 16, 1906, under which they proceeded to make a discovery of gold within the boundaries marked out by them, prior to any discovery by the defendants in error. The exclusive right of possession is by section 2322 of the Revised Statutes (U. S. Comp. St. 1901, p. 1425) conferred only on one who has made a valid location, one of the essentials of which is, as has been said, a discovery of mineral. Prior to that time all such mineral land is in law vacant and open to exploration and location, subject to the well-established rule that no prospector is authorized by any form of forcible, fraudulent, surreptitous, or clandestine conduct to enter or intrude upon the actual possession of another prospector; for every miner upon the public do-

main is entitled to hold the place in which he may be working against all others having no better right. Zollars v. Evans (C. C.) 5 Fed. 172. The matter is, we think, well and tersely put by Costigan on Mining Law, p. 156, where he says:

"'Pedis possessio' means actual possession, and pending a discovery by anybody the actual possession of the prior arrival will be protected to the extent needed to give him room for work and to prevent probable breaches of the peace. But, while the pedis possessio is thus protected, it must yield to an actual location on a valid discovery made by one who has located peaceably, and neither clandestinely nor with fraudulent purposes."

These views are, we think, well sustained by numerous decisions of the Supreme Court, of this court, and various other courts, some of which we cite. Del Monte Mining & Milling Company v. Last Chance Mining & Milling Company, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; King v. Amy & Silversmith M. Co., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419; Creede v. Uintah M. Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501; Cook v. Klonos (C. C. A.) 164 Fed. 529; Johanson v. White, 160 Fed. 901, 88 C. C A. 83; Malone v. Jackson, 137 Fed. 878, 70 C. C. A. 216; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Olive Land & Development Co. v. Olmsted (C. C.) 103 Fed. 568; Gemmel v. Swain, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570; Du Prat v. James, 65 Cal. 555, 4 Pac. 562; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197. Applying the foregoing decisions to the present case, it is impossible to hold upon the record here that the defendants in error had such a possession of the strip of public land 660 feet wide and 2 miles long as precluded any other good-faith prospector from peaceably going within those boundaries and himself making a discovery and location.

It is pertinent to add that the Land Department of the government has recently decided that it would not recognize any such shoestring location as conforming to the provisions of the United States statutes upon the subject. See Snow Flake Fraction Placer, 37 Land. Dec. Dep. Int. 250 (decided November, 1908), where it was said:

"It is the policy of the government to have entries, whether they be of agricultural or mineral lands, in compact form. Congress has repeatedly announced this principle, and the department has always and does now insist upon it. The public domain must not be cut into long and narrow strips. No 'shoestring' claims should ever receive the sanction of this department."

It results that the judgment must be, and hereby is, reversed, and the cause remanded to the court below.

(b) *Conveyances.*

MERCED OIL MINING CO. ET AL. v. PATTERSON ET AL.

1912. SUPREME COURT OF CALIFORNIA. 122 Pac. 950.

ACTION by the Merced Oil Company and others against R. L. Patterson and others. From a judgment for plaintiff, C. H. Castle, defendants appeal. Affirmed.

ANGELLOTTI, J. This is an appeal by defendants, upon the judgment roll from a judgment in favor of plaintiff C. H. Castle against the defendants, adjudging him to be the owner and entitled to the possession of 40 acres of mineral land (the mineral being oil), being the south half of the north half of the southeast quarter of section 22, Tp. 19 S., R. 15 E., M. D. B. & M. The case was before us on a former appeal involving a judgment against defendants in favor of Castle for said land, and also in favor of the Merced Oil Mining Company for the north half of the south half of said southeast quarter of said section, the action having been dismissed as to the Great Northern Oil Company. The judgment was affirmed as to said Merced Oil Mining Company, and reversed as to Castle. Merced Oil Mining Co. v. Patterson et al., 153 Cal. 624, 96 Pac. 90. The action was thus terminated as to said company. A retrial was had between plaintiff Castle and the defendants, resulting in the judgment appealed from.

A very general statement of the material facts appearing on the former appeal is essential to a proper understanding of the question presented. In May, 1899, one Spinks and seven associates had entered upon and located under the placer mining laws for the purpose of exploring for oil the whole of the southeast quarter of said section 22, the same being vacant, unoccupied mineral lands of the United States, complying with all the requirements of the law in regard to the making of such selection, and thenceforth proceeding with the work of development. In January, 1900, they conveyed in severalty to the Merced Oil Mining Company the portion claimed by such company. In February, 1900, they conveyed in severalty to Castle the portion claimed by him. The Merced, etc., Company duly prosecuted the work of discovery on the portion conveyed to it, and in September or October, 1900, made a sufficient discovery of oil. This was the first and only discovery ever made on said southeast quarter. The defendants claimed under an entry and attempted the location of said southeast quarter made in 1904, Castle never having taken possession of the part conveyed to him or done any development work thereon. This action was commenced June 24, 1904.

[1] The case thus presented, as to both plaintiffs then before the court, the question of the effect of a conveyance of all the interest

of eight associates, who had made a consolidated location of 160 acres as an oil claim, and who were in possession thereof, and engaged in the work of development to discover oil thereon in a certain designated and described portion thereof, by such associates to an outsider, before the location had been perfected by a discovery of oil. It was squarely held that such a conveyance is operative to give to the grantee all of the rights which the grantors formerly held in the land covered thereby. This much, of course, was essential to the adjudication in favor of the Merced Oil Mining Company, which had taken possession of the 40 acres covered by the conveyance to it, and thenceforth had prosecuted development work thereon to a discovery. The court said: "No doubt may be entertained that a conveyance such as this may be made, and that the effect of such conveyance, if such be its expressed intent, is to surrender to the grantee all of the rights which the grantors formerly enjoyed"— that is, the right to possession against all illegal intrusions—while he is in possession diligently prosecuting his work of discovery, and the right to obtain a perfected location by a sufficient discovery while so continuing in possession. Such a conveyance before discovery is not an abandonment of the claim as to the portion conveyed, in the sense that such portion is removed from the protection of the original location as a source of the right to possession. The portion so conveyed is not by force of the conveyance rendered vacant and unoccupied mineral land open for new entry. To this extent certainly the law of the case is established by the decision of the prior appeal, not only as to the Merced Oil Mining Company, but also as to Castle, for the question involved is one of the questions necessarily presented as to both of said plaintiffs. The opinion determines this question in favor of both said plaintiffs in the manner we have indicated, and the views expressed thereon at that time thus became the law of the case, binding on the lower court on the retrial, and binding upon us upon this appeal.

[2] Were the question an open one, however, we see no good reason warranting us in declaring a different rule. The decision was in line with the earlier case of Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63. The latter case, it is true, was limited to the effect of conveyances of undivided interests among the associates themselves. But, so far as this matter is concerned, we see no difference in principle between such conveyances and a conveyance by the associates to an outsider of either an undivided interest or a segregated portion. Such objections as may be made on the score of public policy or the policy of the mining laws of the United States would appear to apply equally to either. It was said in Miller v. Chrisman, supra: "We cannot perceive why these rights (the rights of associates in possession under such a claim) may not in good faith be made the subject of a conveyance by the associates as well before as after discovery. There is certainly nothing in

the expressed law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction." Whatever argument may be made against this view, we are satisfied that, so far as the courts of this state are concerned, it must be held to be a rule of property from which a departure should not now be made. This was fully recognized by Chief Justice Beatty (who dissented in Miller v .Chrisman, supra) by his concurrence in the opinion filed on the former appeal in this case. It is likewise to be noted that in affirming the judgment of this court in Miller v. Chrisman, supra, the Supreme Court of the United States said nothing inconsistent with what had been said by this court on this question. Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770.

Upon the former appeal the record did not show anything in regard to the conveyance to the Merced, etc., Company, other than that it was an absolute conveyance of a segregated portion for a money consideration. It was held that, nothing else appearing, the segregated portion conveyed must thenceforth be held to be a separate and independent claim, without further connection in any way with the remaining portion, with the result that a subsequent discovery upon the portion conveyed would not redound to the benefit of such remaining portion and thus be sufficient to validate and perfect the location of the owners thereof, and that work done and money expended upon the portion conveyed would not be a sufficient compliance with the laws of the United States requiring the performance annually of work of a certain value, as to the remaining land. But the court, for the purposes of the new trial ordered, was very clear in its statement of the circumstances under which a different conclusion would be required.

After saying that the conclusion reached expressed the condition that must obtain where "the agreement of the parties goes no further than to a bare conveyance of the grantor's possessory rights," the court said: "But, upon the other hand, by convention and agreement of the parties, a radically different result may be legally accomplished. No one would question but that the associates might authorize a stranger to their interests to enter upon their land and sink a well, agreeing, in the event of a discovery of oil, to convey to such person any designated portion of the claim. In such case, clearly the work would be done for the benefit of all the associates and of the whole claim. It cannot make any difference that the conveyance to the party who is so to develop the land is made before or after discovery, provided that it be understood between them, as part of the consideration, that the work done and the discovery when made shall be for the benefit of the whole claim. As parol evidence is always received to show the true consideration of a contract, this part of the consideration may rest upon an oral agreement of the parties and need not therefore be embodied in the deed. * * *

No reason is perceived why the parties may not make a conveyance of a divided as well as an undivided interest, to the end that the grantee may prosecute the work of discovery for the benefit of all. * * * Coming to apply this principle to the facts in this case, if as a part of the consideration of the deed to the Merced Oil Mining Company it was understood and agreed between the parties that the labor done and money expended upon the Merced Company's 40 acres should operate for the benefit of the land remaining in the possession of the associates, such effect would be legally given. And, in turn, the value of the work and the resulting discovery would redound to the benefit of all subsequent grantees of the associates."

[3] It cannot be seriously questioned that the findings of the trial court on the retrial clearly bring this case, as to the Castle 40 acres, within the rule thus declared. Some point is made of the fact found that the first conveyance by the associates was to one Harris, instead of to the Merced Oil, etc., Company and that such company which was the immediate grantee of Harris instead of the associates and which had not been organized at the time of the conveyance to Harris, never agreed to do the development work for the benefit of the associates, and that Harris never personally assumed any such undertaking, but only agreed that the company to be organized should do so. There is no force in this claim. The findings clearly show that it was agreed at and before the time of the conveyance to Harris, between the associates on the one side and Harris and four other persons (one of whom was Castle) on the other, as a part of the consideration for the execution and delivery of the deed, that Harris and his associates would organize such corporation; that Harris would convey the property to the corporation immediately upon its organization; that such corporation would thereupon immediately occupy the land and proceed diligently with the work of exploration for oil thereon; that the labor done and the money expended by it on such land should operate for the benefit of the remaining land and all subsequent grantees thereof; and that any discovery of oil thereon should operate to the benefit of the remaining land in the way of perfecting the location of the original associates and their subsequent grantees. They further show that the course of procedure thus agreed upon, to use the language of counsel for respondent, "was adopted, acted upon, and carried into execution in full compliance with the understanding and intention of all of the parties." Harris did exactly what he agreed to do as a part of the consideration for the deed, and the corporation subsequently organized has done exactly what he agreed, as a part of such consideration, that it would do in the matter of occupying, exploring for, and developing oil thereon. Regardless of all question whether the corporation was in any way bound by the undertaking of Harris to the associates, we have

that undertaking fully satisfied, and the consideration agreed upon executed. In all other respects the findings of the retrial are the same as they were on the first trial.

Assuming, as contended by learned counsel for appellants, that what was said on the former appeal as to the effect of such an undertaking by the purchaser in part consideration of the sale is not the law of the case, we have upon this appeal simply the question whether we should adhere to the views thus expressed.

[4] It is the established rule, as declared in Miller v. Chrisman, supra, that a location made by an association of persons, being but a single location and not eight separate locations, is to be treated as an entirety under one location for all purposes of marking boundaries, doing assessment work, expenditure for patent, and discovery of oil, and that but a single discovery is all that is required to support it. We see no good reason why the associates may not maintain this condition of entirety *for such purposes,* for the benefit of themselves and their successors, notwithstanding their conveyance of a segregated portion under such circumstances as are disclosed by the findings in this case. The conveyance was made in consideration of the undertaking to do the discovery work for the benefit of the associates and their grantees. By reason of that undertaking, the grantee, while possessing all the rights of the associates as to the portion conveyed, was substantially and in effect the agent of the associates for the purpose of doing the necessary work and making such a discovery as would perfect the original location as an entirety. As was pointed out in the former opinion, the only difference between such a grantee and one to whom a conveyance of a segregated portion has been promised upon a discovery by him sufficient to perfect the location is that he has been paid his consideration in advance. In both cases the work is being done "for the benefit of all the associates and of the whole claim." For the purposes we have specified, it is the work of the associates. We are of the view that the former opinion correctly states the law on this question, and should be adhered to. We find nothing in McLemore v. Express Oil Co., 158 Cal. 559, 112 Pac. 59, that is at all inconsistent with either Miller v. Chrisman, supra, or our decision on the former appeal in this case, nor can we perceive that it involved any question material here.

As we have said, the defendants claim under an entry made in 1904. At that time, in view of what we have already said, the location had long since been perfected as to the entire 160 acres, including the portion conveyed to Castle by the associates, by a sufficient discovery of oil on the portion held by the Merced Company. We are not concerned here with any question as to the effect of Castle's lack of personal possession of the portion conveyed to him, pending such discovery, for there was no attempted

entry by defendants during such period. After the entire location had been perfected by discovery, such actual possession was not essential to the protection of his rights. As we understand the record, it is not questioned that the necessary assessment work has been done on the Merced Company's portion of the 160 acres each year since the discovery of oil in 1900, to and including the year 1903.

The judgment is affirmed.[3a]

Section 2.—What Constitutes Discovery.

WATERLOO MIN. CO. v. DOE ET AL.

1893. CIRCUIT COURT, S. D. CALIFORNIA. 56 Fed. 685.

PROCEEDING by the Waterloo Mining Company against John S. Doe, James L. Patterson, and Diedrich Bahten to determine the right to a mining claim. Decree declaring that neither party is entitled to the disputed ground.

Ross, District Judge.[4]—* * * I think it clear from the evidence that neither at the time of Bahten's location of the Oregon No. 3, nor at the time of its relocation by his grantee, the respondent Doe, had there been discovered, nor has there yet been discovered, so far as the evidence shows, any vein or lode of quartz or other rock in place within the boundaries of the claim.

As has been already observed, Bahten himself admits in his testimony that at the time his location was made there had been no such discovery made, but that the claim was located "in the hope of finding some ore in it at some time;" and the testimony of Mr. John Hays Hammond, a mining engineer of much learning and experience, and who made a critical examination of the ground shortly before giving his testimony, shows clearly that no vein or lode has yet been discovered within the boundaries of the claim; that there are no outcroppings of any vein or lode upon the surface of the ground; and the little exploration that has been made by means of cuts, a small tunnel, and a shallow shaft has failed to disclose any such vein or lode. It is quite true that from one or more of the cuts Stevens extracted the ore already mentioned, and that other mineral-bearing rock exists in them, samples of which were introduced in evidence as exhibits in this case. But the testimony of Hammond, which is not overcome or impaired by that of Tucker, Patterson, Scupham, or any other witness, shows that it did not come from any defined vein or lode, so far as can be ascertained from developments so far made. It is obvious that without the discovery of a vein or lode the ground in question was not subject to location as a mining lode claim. I am

[3a] See federal statute of March 2, 1911, quoted in appendix post p. 801.

[4] Part only of the opinion is given.

therefore of opinion that neither party to the suit is entitled to enter the ground embraced within the boundaries of the Oregon No. 3 as a mining claim.

A decree in accordance with these views will be entered.

CHRISMAN v. MILLER.

1905. SUPREME COURT OF THE UNITED STATES.
197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. 468.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of Fresno County in that state in favor of plaintiffs in an action to quiet title to mineral lands. *Affirmed.*

See same case below, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.

Mr. Justice BREWER delivered the opinion of the court.[5]

In cases coming from a state court we do not review questions of fact, but accept the conclusions of the state tribunals as final. *Clipper Min. Co.* v. *Eli Min. & Land Co.*, 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632, and cases cited in the opinion; *Kaufman* v. *Treadway*, 195 U. S. 271, ante, p. 33, 25 Sup. Ct. Rep. 33; *Smiley* v. *Kansas*, 196 U. S. 447, *ante*, p. 289, 25 Sup. Ct. Rep. 289.

By the findings of the trial court the Chrismans, plaintiffs in error, never made any discovery of petroleum or other mineral oil, did not make the attempted location in good faith, and never did any work on the tract. These findings were of date June 24, 1899, nearly two years and a half after their attempted location. It would seem from these facts that they had no pretense of right to the premises.

It is contended, however, that the supreme court, in its opinion, practically set aside these findings in one respect, and that is the discovery of petroleum. We do not so understand that opinion. The only reference made to the matter is in these words: "The alleged discovery of defendants under their location may be disposed of in a single sentence. It amounted to no more than the pretended discovery by Barieau;" and in reference to Barieau's alleged discovery the court said:

"Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony, it amounts

[5] The statement of facts is omitted.

to no more than this, that Barieau had walked over the land at the time he posted his notice, and had discovered 'indications' of petroleum. Specifically, he says that he saw a spring, and 'the oil comes out and floats over the water in the summer time, when it is hot. In June, 1895, there was a little water with oil and a little oil with water coming out. It was dripping over a rock about 2 feet high. There was no pool; it was just dripping a little water and oil, not much water.' This is all the 'discovery' which it is even pretended was made under the Barieau location."

There is nothing in this language from which it can be inferred that the supreme court of the state set aside the finding of the trial court. All that it said was in answer to the contention of the defendants that they had made a discovery, and that contention the supreme court repudiated, leaving the finding of fact to stand as it was made by the trial court.

It is further contended that the location made by Barieau and his associates, and conveyed by them to Miller, did not lapse until midnight of December 31, 1896; that then it lapsed by reason of the failure to do the annual work required by statute; that Miller could not prior thereto abandon and relinquish that location, and at the same time make a new one, as he attempted to do on the afternoon of December 31, because the effect of such action would be to continue a possessory right to the tracts without compliance with the statutory requirement of work. Hence, as contended, the only valid location was that made on January 1, 1897, by the defendants. It may be doubted whether, in view of their want of good faith, the defendant's can avail themselves of their contention, and, indeed, also doubted whether they could uphold their location by proof of a discovery by some other party. But it has no foundation in fact, for, as found by the trial and held by the supreme court of the state, the attempted location by Barieau and his associates in June, 1895, was a failure by reason of a lack of discovery. We have already quoted the declaration of the supreme court. The testimony referred to in that quotation, even if true, does not overthrow the finding. It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration.

By 29 Stat. at L. p. 526, chap. 216, U. S. Comp. Stat. 1901, p. 1434, "lands containing petroleum or other mineral oils, and chiefly valuable therefor," may be entered and patented "under the provisions of the laws relating to placer mineral claims." By § 2329, Rev. Stat. U. S. Comp. Stat. 1901, p. 1432, placer claims are "subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." By § 2320, Rev. Stat. U. S. Comp. Stat. 1901, p. 1424, "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In *United States* v. *Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195, a suit brought by the United States to set aside placer patents on the charge that the patented tracts were not placer mining ground, but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for the patents, we said (p. 683, L. ed. p. 575, Sup. Ct. Rep. p. 199):

"It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify the exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining cross-cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand, and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents were made."

This definition was accepted as correct in *Iron Silver Min. Co.* v. *Mike & S. Gold & Silver Min. Co.*, 143 U. S. 394, 36 L. ed. 201, 12 Sup. Ct. Rep. 543, though in that case there was a vigorous dissent upon questions of fact, in which Mr. Justice Field, speaking for the minority, said (p. 412, L. ed. p. 207, Sup. Ct. Rep. p. 548): "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." And again (p. 424, L. ed. p. 211, Sup. Ct. Rep. p. 552): "It is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent of the ground embracing it, but those only which possess these metals in such quantity as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and lodes yielding no remunerative return for labor expended upon them."

By the Land Department this rule has been laid down (*Castle* v. *Womble*, 19 Land Dec. 455, 457):

"Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in

the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.' "

Some cases have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion. In respect to this Lindley on Mines, 1st ed. § 336, says:

"But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would *justify* a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

It is true that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining.

Giving full weight to the testimony of Barieau, we should not be justified, even in a case coming from a Federal court, in overthrowing the finding that he made no discovery. There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it "chiefly valuable therefor." If that be true were the case one coming from a Federal court, *a fortiori* must it be true when the case comes to us from a state court, whose findings of fact we have so often held to be conclusive.

The judgment of the Supreme Court of California is affirmed.[5a]

[5a] "It is the common experience of persons of ordinary intelligence that petroleum in valuable quantities is not found on the surface of the ground, nor is it found in paying quantities seeping from the earth. Valuable oil is found by drilling or boring into the interior of the earth, and either flows or is pumped to the surface; and until some body or vein has been discovered

FOX ET AL. V. MYERS ET AL.

1906. SUPREME COURT OF NEVADA. 29 Nev. 169, 86 Pac. 793.

NORCROSS, J.[6]—This is an action of ejectment to recover possession of a certain mining claim in Goldfield mining district, Esmeralda county. Upon the trial of the cause in the court below, after plaintiffs had offered their evidence, counsel for respondents interposed a motion for a nonsuit. The motion was granted, and judgment entered accordingly. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

The allegations of plaintiffs' complaint which are material in the consideration of the questions presented upon this appeal, are substantially as follows: That on the 28th day of May, 1903, the said plaintiff Carl Schmidt, for himself, and on behalf of the other said plaintiffs, located, in accordance with the mining laws, a certain mining claim in Goldfield mining district, by erecting thereon a location monument, and posting a location notice therein, naming and designating said claim as the "Ramsey Extension." That on the 26th day of August, 1903, while plaintiffs were in the lawful possession of said claim, the defendants wrongfully, unlawfully and fraudulently entered into and upon said mining claim, and by their wrongful, unlawful and fraudulent acts did oust and eject the plaintiffs from the possession of said mining claim, [which they located as the Idol's Eye] and ever since said time have continued to so wrongfully, unlawfully, and fraudulently withhold said claim from the plaintiffs. That on the said 26th of August, 1903, the said plaintiff Fox, for and on behalf of himself and the other of said plaintiffs, did go upon said mining claim to complete the location of the same, in accordance with the requirements of law, but was prevented from so doing by reason of the aforesaid wrongful acts of defendants. The defendants' answer consists of a specific denial of each of the allegations of the complaint. * * *

The trial court, in ruling upon the motion for a nonsuit, held that the plaintiffs had failed to show that they had made a discovery upon which a mining location could be based. * * *

In considering the question whether the evidence produced by the plaintiffs was sufficient to establish the fact of a discovery by them upon the Ramsey Extension claim, it must be understood that the evidence is to be tested by the rules governing in the case of rival claimants to the same mining ground, taken in connection with the liberality with which evidence is construed in favor of the plaintiffs

from which the oil can be brought to the surface, it cannot be considered of sufficient importance to warrant a location under the mineral laws."—Burford, C. J. in Bay v. Oklahoma Southern Gas Oil & Min. Co., 13 Okla. 425, 436, 73 Pac. 936, 940.

[6] Parts of the opinion are omitted.

on a motion for a nonsuit. Upon the latter proposition, this court in the case of Patchen v. Keeley, 19 Nev. 409, 14 Pac. 347, had occasion to say: "In considering the court's ruling in granting the nonsuit, we must take as proven every fact which the plaintiff's evidence tended to prove and which was essential to his recovery, and give him the benefit of all legal presumptions arising from the evidence." * * *

In Migeon v. Montana Cent. Ry. Co., 77 Fed. 254, 23 C. C. A. 161, the United States Circuit Court of Appeals, in an opinion written by Judge Hawley, points out in the following manner the distinction that exists in various classes of cases, upon the question of the proof that will be required to establish a discovery: "There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein within the intent of different sections of the Revised Statutes: (1) Between miners who have located claims on the same lode, under the provisions of section 2320 [U. S. Comp. St. 1901, p. 1424]. (2) Between placer and lode claimants under the provisions of section 2333 [U. S. Comp. St. 1901, p. 1433]. (3) Between mineral claimants and parties holding townsite patents to the same ground. (4) Between mineral and agricultural claimants of the same land. The mining laws of the United States were drafted for the purpose of protecting the bona fide locators of mining ground and at the same time to make necessary provisions as to the rights of agriculturists and claimants of townsite lands. The object of each section, and of the whole policy of the entire statute, should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the character of the cases, and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court. * * * The fact is that there is a substantial difference in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein or lode between different claimants of the same lode, under section 2320 [U. S. Comp. St. 1901, p. 1424], on the one hand, and a lode known to exist within the limits of a placer claim at the time application is made for a patent therefor, under section 2333 [U. S. Comp. St. 1901, p. 1433], on the other. * * * The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes [U. S. Comp. St. 1901, p. 1424] has been decided by many courts. All the authorities cited by appellants are referred to in Book v. Mining Co. (C. C.) 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that when a locator of a min-

ing claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developng the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode." * * *

The evidence in this case shows that, at or near the location monument of the Ramsey Extension claim, there was an outcropping, and we think it may be inferred from the evidence that this outcropping carried values. We think it also may be inferred from the evidence that the plaintiffs intended to base their claim of a discovery upon this outcropping when they erected the monument and posted their notice of location of the Ramsey Extension claim upon or near it. It is not necessary to determine whether this state of facts alone would be sufficient to justify the trial court in denying the motion for a nonsuit; but, taken in connection with other facts which are shown, or which may be inferred from the evidence, we think the showing was sufficient to require that the motion be denied. The contention of counsel for appellant has not been questioned that the location monument of the Idol's Eye claim and the location monument of the Ramsey Extension claim, were one and the same. This fact may be inferred from the evidence, and for the purposes of the motion it should be considered as an established fact. Our statute (Comp. Laws, § 208) requires that the notice of location be posted "at the point of discovery." Therefore, when a locator erects a location monument and puts his location notice thereon, he, in effect, declares that at that point he has made a discovery. This is so in order that another prospector going upon the same ground may not only see that some one else claims to have initiated a location, but upon what discovery, or alleged discovery, if any, such claim is based. * * *

Proof of posting a location notice at a certain point, containing a recital therein that a discovery had there been made, as in the case of the Ramsey Extension notice, would not be evidence prima facie of a discovery, as contended for by counsel for appellant, for the reason, if for none other, that the statute does not require the making of such a declaration in the notice. 1 Lindley on Mines (2d Ed.) § 392; 2 Jones on Evidence, § 521.[7] Proof, however, that a notice

[7] In Smith v. Newell, 86 Fed. 56, 60, Marshall, District Judge, said of a location by plaintiff prior to the location of defendants: "On this point, the plaintiff's case rests on the theory that, a record of a location and the mark-

was posted at a certain point establishes that at that point the locator claims a discovery. When it was shown that the Idol's Eye location notice was placed at the same point as that of the Ramsey Extension, it put the defendants in this action also in the position of claiming a discovery at the same point that the plaintiffs did. Both sides claiming a discovery at the same point would warrant the presumption, in the absence of a showing to the contrary, that both based their claim of a discovery upon the same natural conditions, and, where such a showing exists, the court is justified, at least for the purpose of the motion, in presuming the existence of a discovery, because of the fact that there is, in effect, an admission by both parties that such discovery exists. If it were shown that a person had posted a location notice where there were no indications whatever of a lode or vein, and that subsequently another person, as a result of sinking a shaft at that point, or by some other development work, had discovered a vein not indicated upon the surface of the ground, it could hardly be said that such second party by reason of the fact that he posted his location notice at the same point as the first claimant, thereby admitted that such prior claimant had also there made a discovery. But such is not the state of facts disclosed by the evidence in this case. Indulging in all legal presumptions, and construing the evidence, under the rule heretofore quoted, most favorably in favor of the appellants, we are compelled to say that the evidence warrants the inference, at least, that both parties to this action are claiming the right to hold the ground in controversy under the same claim of discovery. Under such a state of facts the evidence upon the question of discovery was sufficient upon which to have based a denial of the motion for a nonsuit.

For the reasons given, the judgment and order are reversed, with directions to the lower court to grant a new trial.

MURRAY v. WHITE ET AL.

1911. SUPREME COURT OF MONTANA. 42 Mont. 423, 113 Pac. 754.

HOLLOWAY, J.[8]—This suit was brought by Murray to enforce the specific performance of a contract to convey real estate. From a decree in favor of plaintiff and from an order denying them a new trial, the defendants have appealed.

In his complaint the plaintiff alleges that in July, 1898, he and the defendant White each had an application before the Land Department of the United States, to enter the S. ½ S. E. ¼, and the S. E. ¼

ing of it on the ground being shown, the court should presume a discovery of a vein. I do not think such a presumption should be made."

[8] Parts of the opinion are omitted.

S. W. ¼ of section 17, township 3 N., range 7 W., in Silver Bow county; that the parties were claiming the land adversely, and, for the purpose of effecting a compromise and facilitating the issuance of patent, they entered into a contract by the terms of which Murray agreed to relinquish his claim to the S. E. ¼ S. W. ¼, hereinafter called the west forty, and the S. W. ¼ S. E. ¼, hereinafter called the middle forty, and not hinder or obstruct the issuance of patent therefor to White; and White agreed to relinquish his claim to the S. E. ¼ S. E. ¼, hereinafter called the east forty, and not thereafter hinder Murray in securing patent to that portion of the land. * * * The answer of the defendant White does not deny any allegation of the complaint, but contains four separate affirmative defenses. The material allegations of these defenses were denied in a reply. Upon the trial the defendants assumed the burden of proof. The trial court found against them as to every one of their defenses, and the contention now is that the evidence preponderates against the findings made.

First Defense. It is alleged that the contract was procured by fraud, misrepresentation, and unfair practices on the part of Murray, in this: That all the lands were agricultural lands of the United States; that White had a bona fide application before the United States Land Department to enter such lands under the homestead laws; that Murray claimed that all of the lands contained valuable deposits of placer gold, and was claiming them under a pretended location thereof as a placer mining claim, whereas, in truth and in fact, said lands did not contain any deposits of placer gold and were nonmineral in character, all of which facts were well known to Murray but unknown to White; that in fact Murray did not have any claim to the lands; had prior thereto relinquished his pretended claim to the east forty altogether, and permitted others to locate the same; that, for the purpose of deceiving White and inducing him to enter into the contract in question, Murray misrepresented the character of his pretended claim to the west and middle forties, and concealed from White the fact that he had no claim whatever to the east forty; that Murray represented that he had a good and valid placer location upon the lands and would contest and litigate with White for the lands; that, relying on, and believing in, Murray's representations as to the character of his claim, and to avoid the threatened litigation, and not otherwise, White entered into the agreement.

(a) Appellants attack Murray's placer location as being fraudulent. They insist that the evidence shows that Murray knew that the ground was nonmineral in character, and that his representation to White that he had a valid placer location was false, and made with intent to deceive White and induce him to enter into the contract. It is true that the evidence as to the presence of minerals in the ground is very slight, and that Murray had maintained his location for several years without developing a paying placer, and without

demonstrating that the ground was in fact valuable for the minerals it contained. But there is some evidence that placer gold had been discovered in the ground, the surface of which is decomposed granite and other rock washed down from the nearby mountains. All the other portions of section 17 have been patented as placer locations. The ground is situated near the great quartz mines of Butte, and along the same stream, and not far from producing placers. The general character of the soil and the location of the ground are such as to indicate the presence of placer gold. Witnesses expressed the opinion that the ground could be mined profitably by dredging. Under these circumstances we do not think that it can be said that the evidence shows such a degree of poverty in the placer claim that Murray's assertion of that claim should be held to be fraudulent. Neither the federal nor state statutes require that, to constitute a placer, the ground shall yield any specific quantity of precious metals. Neither is it required that the deposits of mineral shall be sufficiently extensive to pay operating expenses, in order to locate and maintain a valid placer claim.

It has long been the settled rule that, to constitute a discovery, within the meaning of that term as used in mining law, it is sufficient that precious metals be found in the ground in quantity which justifies the locator in spending his time and money in prosecuting development work, with the reasonable hope or expectation of finding mineral in payment quantities. Harrington v. Chambers, 3 Utah 94, 1 Pac. 362; Book v. Mining Co. (C. C.) 58 Fed. 106; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 676; 27 Cyc. 556; Snyder on Mines, §§ 349, 360; Shreve v. Copper Bell M. Co., 11 Mont. 309, 28 Pac. 315; McShane v. Kenkle, 18 Mont. 208, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579; Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842. The precious metals are not evenly distributed throughout veins or placer ground. A claim may be barren in one part, poor in another, rich in another, and withal very valuable as a whole, so that the failure of the locator to develop a paying property within any given time is not conclusive against the validity of his claim. It is a part of the history of this mining region that, even in the case of a placer claim, much time and labor must be expended and considerable expense incurred in developing a paying claim, when bed rock is covered with great quantities of débris, as is the case in the present instance. The evidence shows that Murray is a man of experience in mining operations, and that he evidenced his faith in the validity of his claim by the expenditure of considerable money in sinking shafts in attempts to reach bed rock, where he expected to find placer gold. Furthermore, White had an equal opportunity with Murray to examine the soil, determine its character, and decide for himself whether Murray's contention that the land was mineral in character had any foundation in fact. While there are facts and circumstances which tend to discredit Murray's claim, we are not satis-

fied that the evidence preponderates against the trial court's finding. * * *

Fourth Defense. (a) The fourth defense is based upon the proposition that, since Murray had a mineral application for all these forties, and White had an agricultural application for the same lands, there could not be a lawful compromise of their claims so that one could receive a part of the disputed ground under a mineral application, and the other the remaining portion under his agricultural application. In their brief counsel for appellants say: "The two claims were antagonistic to each other; one of them was fraudulent and illegal, based on false testimony, and was an attempt to defraud the government of the United States." This premise is clearly erroneous, and the argument based upon it, of course, equally so. That one person in perfect good faith may assert a mineral application for a particular parcel of public land, and another person, equally in good faith, may assert his agricultural application for the same ground, is beyond question. The same land may be valuable for both mineral and agricultural purposes. Its mineral value may be slight, and under such circumstances it is a question of fact whether it is mineral land within the meaning of the federal statute. Under such circumstances the controversy is settled by the Land Department, by determining whether the land is more valuable for the one purpose or the other. Washington v. McBride, 18 Land Dec. Dep. Int. 199; Sweeney v. Northern Pacific R. R. Co., 20 Land Dec. Dep. Int. 394; Walker v. Southern Pacific R. R. Co., 24 Land Dec. Dep. Int. 172.

It is conceded that, as between rival claimants for the same piece of public land, a compromise of their differences is recognized—even encouraged—by the government; but it is argued that, in every instance wherein reference was made to this well-known rule, both claimants were asserting rights under the same general character of entry. And it is insisted that a case cannot be found in which the government recognized the right of one claimant, who was asserting title under a mineral location, and his rival, who was asserting title under an agricultural entry, to compromise their differences, so that one could secure patent to a portion of the land under his mineral application, and the other the remaining portion under his agricultural entry; and this may be true, but the fact, if it is a fact, that such a case has not been determined can scarcely be considered evidence that such a compromise would not be recognized by the federal authorities, if a case presenting it did arise. We do not see any difference in principle between a case of this kind and one involving a controversy between rival claimants under the same character of entry. Of course, title to known mineral land cannot be secured under agricultural entry (section 2318, Rev. St. U. S. [page 1423, U. S. Comp. St. 1901]), and any effort on the part of rival claimants to secure such a result would be defeated as an attempted fraud on the government; but where, as in the case before us, the land has little

value for either purpose, and there is a bona fide contest involved as to the particular use for which the land has the greater value, we do not see any objection which the government could interpose against an amicable settlement of the difficulty by a division of the land between the rival claimants. Certainly there was not anything done by these parties which precluded the government from making an investigation of the land to determine its character. * * *

We do not find that any reversible errors were committed. The judgment and order are affirmed.

Affirmed.

LANGE v. ROBINSON et al.

1906. CIRCUIT COURT OF APPEALS. 79 C. C. A. 1, 148 Fed. 799.

APPEAL from the District Court of the United States for the Third Division of the District of Alaska.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge.[9] This action was commenced in the District Court for the District of Alaska, Third Division, for the purpose of determining that the plaintiff is the owner and entitled to the possession of certain mineral lands, to which the defendants assert an adverse claim. At the conclusion of the evidence offered by the plaintiff the defendants moved for a dismissal of the action upon the ground that the plaintiff had failed to show that he had any legal or equitable estate in the land described in the complaint, and for the further reason that it was not shown that he was in possession of such land at the date of the commencement of the action. The motion was granted upon the ground first stated, and it was thereupon adjudged that the action be "dismissed without prejudice against the plaintiff of any kind whatsoever," the defendants to recover costs. From this judgment the plaintiff has appealed.

The lands in controversy embrace 10 separate placer mining claims, containing 20 acres each. One of these claims was located by H. W. Benson, grantor of plaintiff, one by the plaintiff for himself and the remaining eight by the plaintiff acting as agent for others, who have since conveyed to him. The locations were made on April 15, 1905; and the first question which we will consider is whether prior to that date the locators had made such a discovery of gold thereon as entitled them to locate the lands as placer mining claims. These claims are situate on Cripple creek in the Fairbanks mining district, Alaska, and the evidence shows that prior to their location gold had been found on Esther creek, a tributary of Cripple creek. This discovery was made within less than one mile from

[9] Parts of the opinion are omitted.

the land in controversy. In Alaska, as indeed in all places where there is placer gold, it is almost the universal rule that the "pay streak," so called, is in and upon, or near, the bed rock; and until that is reached it cannot be determined whether any particular claim contains gold in such quantity as to be of value for placer mining. The bed rock on Esther creek is from 90 to 100 feet below the surface, while upon the land involved in this action this rock is from 125 to 150 feet below the surface, and the overlying ground is of no value; that is, it does not contain sufficient gold to pay for working it. The plaintiff is a miner of many years' experience, and testified, in substance, that before making his locations he washed upon each claim a few pie plates of the sediment deposited in and along the sides of the creek upon which the claims are located, and found in the several washings from two to six fine colors of gold. This was all of the gold actually discovered by him before he made the locations. The plaintiff also testified that his belief that there was gold on the bed rock of the claims located by him was based upon the colors which he had found, and the further facts that the same general character of sediment deposit and rock and soil formation were found on these claims as on the mineral land on Esther creek, and that in all localities where placer mining is conducted, wherever gold is found on the surface, there will be more or less on the bed rock. He also stated that the "pay streak" in lands of this character is narrow, and usually confined within the limits of an old channel, that it is often found necessary to sink many shafts before it is located, and that the sinking of shafts to such depths as is required upon the lands in controversy would be very expensive. In addition to this, one Field, an experienced miner, who prospected the ground after the locations had been made by plaintiff, and discovered therein colors of fine gold such as were found by plaintiff, testified as follows:

"Q. What would you say to the reasonableness of a man's pursuing the work of prospecting a creek where he found such indications of gold as you found there at that time, as to whether or not he would be justified in doing so?"

"A. The reasonableness? Well, it is looked upon as a business proposition that after a man gets surface indication such as you find down there—that it is looked upon as a business proposition that is sufficient to justify him in expending time and money in exploring it further. There is a large amount of money invested under those conditions."

1. It will be noticed from the foregoing statement of facts that prior to making the locations under consideration plaintiff did not actually discover gold in paying quantities upon the claim located; but he did find some small particles of gold therein. Was this sufficient to give to the plaintiff the right to locate as placer mining claims the lands upon which this gold was found?

The question as to what constitutes a sufficient discovery upon

which to base a valid location of a vein or lode of quartz, or other rock bearing gold or silver deposits, has often been before the courts, and a few of the decisions in relation thereto will be referred to, as the rule which they declare concerning the quantity or the value of the precious metals necessary to be found in the vein or lode before it can be located is applicable in principle in determining whether there has been a sufficient discovery of mineral-bearing earth to authorize the location of a placer mining claim. In Book v. Justice Min. Co. (C. C.) 58 Fed. 106, Judge Hawley said:

"When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim." * * *

* * *

In Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673, the court, after citing with approval the rule above quoted from the opinion in Book v. Justice Min. Co. (C. C.) 58 Fed. 106, as to what is a sufficient discovery of lode or vein claims, said:

"So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay."

We do not understand that any different rule is laid down in Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770. * * *

The question of discovery is in every case one of fact for the court or jury: Iron Silver Co. v. Mike & Starr Co., 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201. There must be some gold found within the limits of the land located as a placer gold claim, but it cannot be said in advance as a matter of law how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. The question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities; and, further, in considering the evidence bearing upon the general question, it must not be forgotten that the object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator, and to prevent frauds upon the government by persons, "attempting to acquire patents to land not mineral in its character." Shoshone Min. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223. And where the

controversy is, as in this case, between persons claiming the land as mineral, "the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority." Chrisman v. Miller, 197 U. S. 313–323, 25 Sup. Ct. 468, 49 L. Ed. 770.

Our conclusion is that, under the rule stated in the cases to which we have referred, the plaintiff and his grantors made a sufficient discovery of gold upon the lands in controversy to entitle them to make a valid location of the same as placer claims, under the laws of the United States. There was an actual discovery of gold upon each of the claims located. They are situated near other lands presenting the same surface indications, which at the date of the location of these claims were known to be valuable for the placer gold which they contained; and these facts, according to the uncontradicted testimony of the plaintiff and that of the witness Field, above quoted, were sufficient to justify the expenditure of money for the purpose of their exploration, with the reasonable expectation that, when developed, they would be found valuable as placer mining claims. This was in our opinion all that was necessary.

2. The action was brought under section 475 of the act of June 6, 1900, entitled, "An act making further provision for a civil government for Alaska, and for other purposes." Chapter 786, 31 Stat. 321. This section provides:

> "Any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest." Chapter 786, 31 Stat. 410.

It was incumbent upon the plaintiff, in order to maintain the action under this statute, to show an actual possession of the land in controversy, or some part thereof, at the date of the commencement of the action. Sepulveda v. Sepulveda, 39 Cal. 13; Durell v. Abbott et al. (Wyo.) 44 Pac. 647. The evidence shows that plaintiff was living upon claim No. 11, in a tent, at the time the action was commenced, and had also begun to sink a shaft thereon as a preliminary step in prospecting or developing the same as a mining claim. This constituted a sufficient possession of that particular mining claim under the statute; and we are also of the opinion that there was sufficient evidence to show plaintiff's possession of the other claims described in the complaint. These claims, as we hold, were properly located as mining claims, and in such case slight acts of dominion will constitute a sufficient possession to enable the locator to maintain an action under the section above quoted.

Judgment reversed, and cause remanded for a new trial.

VERONDA & RICOLETTO v. DOWDY.

1910. Supreme Court of Arizona. 13 Ariz. 265, 108 Pac. 482.

Action by J. T. Dowdy against Veronda & Ricoletto. Judgment for plaintiff, and defendants appeal. Affirmed.

Campbell, J.[10]—Appellee located a placer mining claim upon the unoccupied public lands of the United States. Thereafter appellants moved into and occupied some buildings situated within the limits of the claim. This action of ejectment was brought to recover possession of the premises and for rent. * * *

Error is assigned that the trial court found against appellants' contention that the ground covered by the claim does not contain valuable mineral deposits, and counsel cite various decisions of the Land Department and of the courts bearing upon the rights of a mineral claimant as against persons claiming the land for other purposes. The authorities cited have no application to the facts of this case, but are confined to the rights of claimants of different classes claiming under the public land laws. Appellee made a valid location, after a discovery of mineral. The appellants, being mere trespassers, making no claim to the ground under the public land laws, cannot, by showing that the land is more valuable for some purpose other than mining, oust him from possession.

The judgment of the district court is affirmed.

Section 3.—The Relation Between Discovery and Location.

CREEDE & CRIPPLE CREEK MINING & MILLING COMPANY, Petitioner, v. UINTA TUNNEL MINING & TRANSPORTATION CO.

(See post, p. 295 for a report of the case.)

BEALS v. CONE et al.

(See post, p. 143 for a report of the case.)

PELICAN & DIVES MIN. CO. v. SNODGRASS.

1886. Supreme Court of Colorado. 9 Colo. 339, 12 Pac. 206.

During the years 1875–76, what is known in the record as the "Ontario Tunnel" was run by one Lewis. The tunnel was about 100 feet in length, and disclosed a vein of mineral at its breast. The last 50 feet, and the vein found, were in territory which at the time was

[10] Part of the opinion is omitted.

unappropriated. About 100 feet of drifting was also done by Lewis at or near the inner end of the tunnel. He then took no further steps towards perfecting a mining location. Appellee, Snodgrass, located a claim near the Ontario tunnel, called the "Nadenbusch," and it appears that both Snodgrass and Lewis were under the impression that the Nadenbusch claim covered the apex of the lode disclosed in the tunnel. Snodgrass made his application, and secured a patent for the Nadenbusch claim; Lewis failing to oppose the proceeding by adverse possession or protest. In February, 1881, Snodgrass went into the drift leading from the Ontario tunnel, and did a little work. He also leased the vein existing therein to other parties, but the lease was soon after thrown up. At this time he still believed the apex of the vein to be covered by the Nadenbusch patent; but, upon making surveys with a view to sinking a shaft from the surface down to the drift, he discovered that the apex was outside the Nadenbusch side line, and upon vacant ground. In March following he ran an open cut from the surface, and on the 24th, at the breast thereof, intersected the vein which was shown in the Ontario tunnel. On the same day he posted his discovery notice, and staked a claim at the Cross lode. He then sunk a discovery shaft, and June 3d filed his location certificate. He also took peaceable possession of the tunnel, and thereafter placed a door across the same where the vacant territory began, and 50 feet from the entrance. Several days after Snodgrass commenced his open cut, Lewis began sinking a shaft from the surface, and on the day succeeding Snodgrass' discovery of mineral he also reached the vein. He then posted a discovery notice and proceeded to complete his location of the Contention lode. His location certificate was filed prior to that of Snodgrass, but it was dated March 25th, and fixed the date of discovery as December 14, 1876, when he disclosed mineral in the Ontario tunnel, instead of March 25th, 1881, when he reached the vein in his shaft. The next day, March 26th, Lewis conveyed by deed to the appellant company. Thereafter the company applied for a patent to the Contention lode. Snodgrass filed an adverse claim, and brought this suit in pursuance thereof. Upon trial, verdict and judgment were given for Snodgrass, and the company prosecuted this appeal. The remaining essential facts are sufficiently stated in the opinion.

HELM, J. The Ontario tunnel was not located in pursuance of the law relating to tunnel-sites. Lewis failed to follow up his discovery of mineral therein with any effort whatever towards completing the statutory location of a mining claim. With the possible exception of one day's work, he performed no labor in the tunnel for a period of nearly four years, although he sometimes used it as a store-house for mining tools. Under these facts we are of opinion that, as against intervening rights, he acquired no interest whatever in the disputed ground by virtue of the tunnel in question He could not, four years after discovering the vein in this tunnel, post his dis-

covery notice, erect boundary stakes, file his location certificate, and have the inception of his claim, there being intervening rights, relate back to December 14, 1876, the date of such discovery.

The negotiations of Snodgrass with either Lewis or Seddon for the privilege of using the Ontario tunnel in working the Nadenbusch, a patented mine belonging to Snodgrass, are matters of no consequence in this litigation.

Neither does the mistake, which seems to have been mutual on the part of Snodgrass and Lewis, in supposing that the apex of the vein disclosed in the Ontario tunnel was covered by the Nadenbusch patent, affect the case.

We do not agree with counsel for appellant in their position that it was the duty of Snodgrass, upon discovering this mistake, to inform Lewis, and give him an opportunity to first locate the ground in controversy. As suggested by counsel for appellee, under the evidence, there is no more reason for holding that Snodgrass was estopped from locating the Cross lode without notice to Lewis, than there would be for saying that, had Lewis first ascertained the mutual mistake, it would have been his duty to inform Snodgrass, and give the latter precedence in securing the coveted vein. We therefore discard the Ontario tunnel, and the other matters connected therewith, above mentioned, from further consideration in the case.

Snodgrass first disclosed a vein of mineral upon the ground in controversy by excavating from the surface. He immediately posted his discovery notice, marked the boundaries, and, in the course of seven or eight days, completed his discovery shaft. Within three months from the date of discovery he filed his location certificate for record in the proper office. It is true that Lewis completed his discovery shaft, and recorded his location certificate, at earlier dates than did Snodgrass. But these acts did not overcome the advantage obtained by Snodgrass through his prior discovery.

It is earnestly argued by counsel for appellant that the claim of Snodgrass was a relocation, and that the statute fixing 60 days and three months for sinking the discovery shaft and filing the location certificate, respectively, did not apply to the same. The learned counsel insist that these acts, in connection with relocation, must be performed within a reasonable time; and that, under the circumstances disclosed in this case, 70 days, the period existing between Snodgrass' discovery and the filing of his certificate for record, was not a reasonable time. In response to the foregoing argument, we have this to say: that, in the *first* place, there never having been a location of the ground in controversy, it cannot be treated as an abandoned claim; hence the location of Snodgrass should be regarded as original and not a relocation. But, *secondly*, counsel are mistaken in their view of the law regarding relocations. Construing the relocation provision in connection with the other location statutes, we are satisfied that the legislature intended to place the original

discoverer and the relocator, so far as possible, upon precisely the same footing. That body doubtless desired to give the latter 60 days, after finding the vein (technically, perhaps, there could not be a second *discovery* thereof) and erecting his "new location stake," to sink a discovery shaft, and three months within which to record his certificate. Such is the construction of the law already announced by this court. *Armstrong v. Lower,* 6 Colo. 393.

It follows from the foregoing conclusions concerning the facts and the law that the rights of Snodgrass, by virtue of his location of the ground in controversy, must be held superior to those of appellant acquired through the attempted location of Lewis. It is not necessary for us to separately discuss the specific assignments of error, as the questions presented thereon by appellant have been fully answered.

The judgment will be affirmed.[11]

VAN ZANDT, TRUSTEE, v. THE ARGENTINE MINING CO.

1881. CIRCUIT COURT, D. COLORADO. 8 Fed. 725.

ACTION to recover possession of the Adelaide mining claim, in California district, Lake county, Colorado.

Plaintiff offered evidence to prove that the claim was located by Walls and Powell in the year 1875. As to marking the boundaries of the claim on the surface of the ground, and the finding of valuable ore in the discovery shaft, the evidence was slight; and defendant objected to plaintiff's record title on the ground that these facts were not shown. As there was some evidence on both points, the court held that the paper title should be received. * * *

In the further trial of the cause it appeared that the defendant claimed under two locations, called the Camp Bird and Pine, which it held by patent from the government. Plaintiff's claim is in the general course north and south, or, to be exact, north 33 deg. 10 min. east. Defendant's two claims, overlapping the other somewhat transversely, are in the general course east and west. The contesting claims have the relation of the jaws of shears, and the ground in controversy is that included in the space of intersection and a small part of the Adelaide claim immediately north of the intersection. The discovery shaft of the Adelaide claim is or was at the north end of the claim, and some 300 or 400 feet from the ground in controversy. By later operations, and the erection of a mill and ore-house in the vicinity, it had been filled, and the position of it in the claim

[11] So where several competing locators are in possession of prospecting ground by common consent, the first one to make a discovery and to follow it up in due time with the acts of location has the superior right to the ground located. Crossman v. Pendery, 8 Fed. 693; Johanson v. White, 88 C. C. A. 83, 160 Fed. 901.

was not *very* well shown. Between this shaft and the ground in controversy there were no openings to prove that the lode extended in that direction, and whether it did so extend was strongly controverted. Defendant gave evidence to prove that no mineral was found in the discovery shaft, and that the condition of the ground was such that, if any was found there, it was broken and fragmentary, or, in other words, of the character of float mixed with the slide on the surface of the mountain. It appeared, however, that plaintiff and his grantors had maintained possession of the premises from the first, had made valuable improvements on the claim, and had carried on extensive mining operations at and near the ground in controversy. The Camp Bird and Pine discoveries were west of the ground in controversy 200 or 300 feet, and, as defendant contended, on the top and apex of the lode, which at that point extended almost directly across those locations. The defense, by answer, to the support of which many witnesses were brought into court, was that the ore in controversy was a part of the vein which defendant held by its top and apex. If what has been said to explain the position of the claims is intelligible, it will be apparent that in this view the Adelaide location extended across the vein and on its dip, below the top and apex, which was to the west of that location. And as the Adelaide location was first in time, it became a question whether a location so made and otherwise sufficient would be valid against a junior location on the top and apex of the vein. This having been ruled as expressed in the charge to the jury, much testimony as to the top and apex of the vein, and the continuance of the vein to the ground in controversy, was withheld, and the case stood on the validity of plaintiff's location, whether a vein *in place* was found in the discovery shaft of that location, and whether the vein, if found there, extended to the ground in dispute.

HALLETT, D. J., (*charging jury.*)[12] The questions to be determined on the evidence relate to the plaintiff's location, which he calls the Adelaide. As to the work on the ground necessary to a valid location, the statute of the state provides, among other things, that a discovery shaft shall be sunk to the depth of at least 10 feet, or deeper, if necessary, to find a well-defined crevice. And the federal statute declares that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. The position of the plaintiff is that Walls and Powell, the locators of the Adelaide claim, found a lode or vein in the discovery shaft sunk by them, and that position is controverted by defendant. I do not recall anything said by witnesses as to a crevice in that shaft; but there is some testimony to the effect that ore bearing silver was found there. If you find from the evidence that such ore was taken from the Adelaide discovery shaft, it is important to consider whether it existed in mass and position; or, in other words, in the

[12] Part of the statement of facts and parts of the charge are omitted.

form of a vein or lode; or, on the other hand, in a broken and fragmentary condition, intermingled with the slide and *debris* on the surface of the mountain. For it rests with the plaintiff to show that ore was found in the discovery shaft, and also that the same body, vein, or lode extends to the ground in controversy. Of course, if ore was found in the discovery shaft, and the ore so found was broken and fragmentary, it cannot be said that a body of ore —a vein or lode—was found in that shaft which extends to the ground in dispute. So that, if you find that no ore was discovered in the discovery shaft of the Adelaide claim, or if ore was found in that shaft and it was broken and fragmentary, your verdict will be for the defendant. And in this view—that is, assuming the facts to be as stated—the circumstance that plaintiff's grantors afterwards developed the body of ore in controversy higher up the mountain side, will not affect the result. For a location rests on what may be found in the discovery shaft; and if nothing is found there, or if what is found there does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail. But if a vein or lode was found in the discovery shaft of the Adelaide claim, and it extends throughout the ground in controversy, the plaintiff may prevail.

Something has been said as to whether the locators complied with the other provisions of the statute relating to posting notice of the discovery on the claim, staking the boundaries, all of which must be shown in evidence to constitute a valid location. If you find these things to be proved, and that a vein or lode was found in the discovery shaft, the question remains whether such vein or lode extends to the ground in controversy. Upon the evidence here it may come to the point whether the lode of ore found in the several shafts on the hill was also found in the discovery shaft of the Adelaide claim. Nevertheless, if you believe from the evidence that a vein or lode was found in the discovery shaft, and that it is not the same as the vein or veins found in the shafts on the same claim, higher up the hill, but that it extends throughout the claim, the plaintiff may prevail.

This being shown, although defendant's locations may appear to you to be along the line of the top, apex, or outcrop of the vein, it cannot prevail against a senior location on the dip of the lode.[13] * * *

[13] But in Iron Silver Min. Co. v. Murphy, 3 Fed. 368, 376, Judge Hallett had charged that "no location can be made on the middle part of a lode, or otherwise than at the top and apex, which will enable the locator to go beyond his line [in extralateral pursuit of the lode]" but had explained to counsel "that it has always been a question in my mind whether a location made on the dip of a vein would not be valid as against one of later date, higher up. That is to say, whether, if a location be made upon the dip of a vein, the locator may not pursue it in the downward course although he may not in the upward course, and may not hold the whole which lies within his location and below it, as against any one locating subsequently at a higher point on the same vein" and that the instruction just quoted was given to adhere to the doctrine

The burden is on the plaintiff to establish every material fact, as hereinbefore declared.

The jury returned a verdict for the plaintiff.[14]

GWILLIM v. DONNELLAN AND ANOTHER.

1885. SUPREME COURT OF THE UNITED STATES.
115 U. S. 45, 20 L. Ed. 348, 5 Sup. Ct. 1110.

IN error to the Circuit Court of the United States for the District of Colorado.

WAITE, C. J.[15]—This is a suit begun July 7, 1881, under section 2326 of the Revised Statutes, to determine the rights of adverse claimants to certain mining locations. Donnellan and Everett, the defendants in error here, and also the defendants below, were the owners of the Mendota claim or location, and Gwillim, the plaintiff in error here, and the plaintiff below, the owner of the Cambrian. The two claims conflicted. The defendants applied, under section 2325, Rev. St., for a patent of the land covered by their location, and the plaintiff filed in due time and in proper form his adverse claim. To sustain this adverse claim the present suit is brought, which is in form an action to establish the right of the plaintiff to the premises in dispute, and to the possession thereof as against the defendants, on account of a "prior location thereof as a mining claim in the public domain of the United States."

The question in the case arises on this state of facts:

Upon the trial the plaintiff gave evidence tending to show that Isaac Thomas, on the sixteenth of May, 1878, discovered in the public domain, and within the premises described in the complaint, a vein of rock in place, bearing gold and silver, and sunk a shaft to the depth of 10 feet or more, to a well-defined crevice, and located the premises under the name of the "Cambrian Lode," and performed all the acts required by law for a valid location. The plaintiff got his title from Thomas. In the answer of the defendants they set up title under the Mendota claim, located, as they allege, November 19, 1878. The plaintiff, in presenting his case to the jury, stated in effect that, after the location of the claim by Thomas, and before his conveyance to the plaintiff, one Fallon instituted proceedings to

generally accepted in the state and to "leave the consideration of the question to the Supreme Court, if there be anything in it."

[14] With Van Zandt v. Argentine Min. Co., 8 Fed. 725, should be considered the following statement in Larkin v. Upton, 144 U. S. 19, 21, namely: "It is unquestioned law that the top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title."

[15] Part of the opinion is omitted.

obtain a patent from the United States for another claim, including that part of Thomas' claim wherein was situated the discovery shaft sunk by him; that no adverse claim was interposed, and Fallon accordingly entered his claim and obtained a patent therefor; and, before any new workings or developments done or made by Thomas upon any part of his claim not included in this patent, the defendants entered therein and located the same as a mining claim in the public domain. Upon this statement the court "ruled that inasmuch as that part of the claim of said Thomas, wherein was situated his discovery shaft, had been patented to a third person, the plaintiff was not entitled to recover any part of the premises, and instructed the jury to find for the defendants." This instruction is assigned for error.

Thomas made his location as the discoverer of a vein or lode within the lines of his claim. He made but one location, and that for 1,500 feet in length along the discovered vein. All his labor was done at the discovery shaft. There was no claim of a second discovery at any other place than where the shaft was sunk.

Section 2320 of the Revised Statutes provides that "a mining claim located after the tenth of May, 1872, * * * shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Section 2322 gives "the locators of all mining locations, * * * so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, * * * the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location." The location is made on the surface, and the discovery must be of a vein or lode, the top or apex of which is within the limits of the surface lines of such location. A patent for the land located conveys the legal title to the surface, and that carries with it the right to follow a discovered vein, the apex of which is within the limits of the grant downwards, even though it may pass outside the vertical side lines of the location. The title to the vein depends on the right to the occupancy or the ownership of its apex, within the limits of the right to the occupation of the surface. This right may be acquired by a valid location and continued maintenance of a mining claim, or by a patent from the United States for the land.

To keep up and maintain a valid location $100 worth of labor must be done, or improvements made, during each year until a patent has been issued therefor. Section 2324. By section 2325 it is provided

that a patent may be obtained for land located or claimed for valuable deposits. * * *

A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitled its owner to the exclusive possession of the land, the first location operates as bar to the second. *Belk* v. *Meagher*, 104 U. S. 284. To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute, superior in right to that of the defendants. His location must be one which entitles him to possession against the United States, as well as against another claimant. If it is not valid as against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated. A location on account of the discovery of a vein or lode can only be made by a discoverer, or one who claims under him. The discovered lode must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it. If a discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of his discovery for the purposes of location adverse to him, except as a relocator after he has lost or abandoned his prior right. *Belk* v. *Meagher, supra.*

In this action the plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary. The question to be settled by judicial determination, so far as he is concerned, is as to his own right of possession. He must establish a possessory title in himself, good as against everybody. If there had not been a patent to Fallon, it would have been competent for the defendants to prove on the trial that when Thomas entered, Fallon held and owned a valid and subsisting location of the same property, and was the first discoverer of the lode, the apex of which was within the surface lines of Thomas' claim. Had this been done the location of Thomas would have been adjudged invalid, because the land on which his alleged discovery was made was not open to exploration, it having been lawfully located and claimed by Fallon. The admission made by the plaintiff at the trial, and on which the court acted in instructing the jury to find for the defendants, is the equivalent of such proof. It showed that after May 16, 1878, and before November 19, 1878, Fallon had applied for a patent of the land on which Thomas' alleged discovery was made, and where he had sunk his discovery shaft; that Thomas set up no adverse claim, and that in due time Fallon got his patent; and this because, under the law, the United States had the right to assume that no adverse claim existed. Having failed to assert his claim he lost his title as against the

United States, the common source of title to all. The issue of the patent to Fallon was equivalent to a determination by the United States, in an adversary proceeding to which Thomas was in law a party, that Fallon had title to the discovery superior to that of Thomas, and that consequently Thomas' location was invalid. This barred the right of Thomas to apply to the United States for a patent, and of course defeated his location. From that time all lands embraced in his location not patented to Fallon were open to exploration and subject to claim for new discoveries. The loss of the discovery was a loss of the location. It follows that the court did not err in its instructions to the jury, and the judgment is consequently affirmed.[16]

Section 4.—Discovery Within an Older Existing Location.

UPTON AND OTHERS v. LARKIN AND OTHERS.

1885. SUPREME COURT OF MONTANA. 5 Mont. 600, 6 Pac. 66.

WADE, C. J.—This is an action by respondents to quiet their title to a certain piece or parcel of land known as the "Camanche Quartz Mining Claim," a part of which is claimed by appellants under and by virtue of their location of the Smelter Mining Claim. The facts, as they appear by the special findings and the testimony, are in substance as follows: The Camanche claim was located January 19, 1879. The discovery shaft of the Camanche was within the limits and boundaries of the Shannon claim, as surveyed and patented at that time. At the time of the location of the Camanche claim there had not been any discovery of a vein or lode within its limits; but in running a tunnel on the claim, between the months of December, 1881, and the last of February, 1882, a vein or lode of quartz or rock in place, with one well-defined wall bearing silver or other precious metals, was discovered within the boundaries of said Camanche claim and outside the boundaries of the Shannon claim. The location of the Smelter claim, which covers and includes a portion of the Camanche claim,—the ground so included being the property in dispute in this action,—was, subsequent to the discovery of said vein or lode, in the tunnel of the Camanche claim.

[16] But see the earlier case of Little Pittsburgh Consolidated Min. Co. v. Amie Min. Co., 17 Fed. 57, which held that a locator may sell the ground containing the claim's discovery shaft without invalidating the rest of the location. Of that case Messrs. Morrison & De Soto say: "A distinction can readily be drawn between this and the Donnellan case, supra [115 U. S. 45, 29 L. ed. 348, 15 Min. Rep. 482]; and yet they are so close that it may be considered dangerous to convey that portion of the lode containing the discovery without proper covenants against patenting it as parcel of another claim."—Morrison's Mining Rights, 14 ed., 49.

Upon this state of facts the appellants asked the court, among others, to give the following instruction to the jury, viz.:

"If the plaintiffs did not discover, at the time they made their location, a mineral-bearing vein with one well-defined wall, upon ground subject to location, you should find for defendants. In other words, if the plaintiffs discovered, at the time they made their location, their vein upon land belonging to Charles K. Larrabie, or any one else, then the jury, if they so find from the evidence, should find for the defendants."

The court refused to give the instruction, and upon this refusal is based one of the errors complained of.

The Camanche mining claim was a location without a discovery. At the time the location was made there had been no discovery of a vein or lode within its limits or elsewhere. The location seems to have been made by virtue of a shaft sunk within the boundaries of the Shannon, which was a patented claim, but no vein or lode had been discovered in the shaft at the time of the location, and if there had been, it would have been a discovery upon grounds belonging to other persons, and therefore could not have authorized a location, but about two years subsequent to the location, and before the location of the Smelter claim, a discovery was made in a tunnel on the Camanche claim, and outside of the Shannon boundaries, which discovery, respondents contend, validates the Camanche location. This theory of respondents is based upon an instruction given to the jury in the case of *Jupiter Min. Co.* v. *Bodie Consolidated Min. Co.*, by Judge SAWYER, in the circuit court of the United States, 11 Fed. Rep. 676, as follows:

"I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations, and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein from the date of his discovery, his claim would be good to the limits of his claim, and the location valid."

This instruction, if it is the law, would be applicable to a case where a person enters upon the public mineral lands and discovers what he supposes to be a vein or lode, and makes a location by virtue of such discovery before he has discovered the true vein or lode, and subsequently, and before any other person has acquired any rights, makes such discovery. Such a case would differ, in many respects, from the one under consideration. In this case, the appellants, without any right or authority, and as mere trespassers, entered upon the Shannon mining claim, which had been patented and was held and owned as private property, in which the government had no interest, and which was in no sense public land, and sunk a shaft within

the boundaries of such claim; and without any pretense of having made a discovery therein upon a supposed vein or lode, and simply by virtue of a hole in the ground upon the private property of another, made the location of the Camanche claim. The question is whether such a location becomes valid by the subsequent discovery of a vein or lode within the limits of the claim located? A discovery within the boundaries of the Shannon claim would not authorize or support the location of the Camanche claim outside of such boundaries. The discovery must be within the limits of the claim located, and must have been made on the public mineral lands. A location without a discovery does not carry with it a grant from the government to the exclusive possession and enjoyment of the ground located, nor does such a grant attach or belong to a discovery alone. The right to so possess portions of the public mineral lands, as that the right to purchase attaches thereto, comes alone from a discovery and location in pursuance of law. If a discovery is made, the right of location follows.

"A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of congress, and the local laws and regulations." *Belk* v. *Meagher,* 104 U. S. 284.

If, by the law, something remains to be done before the declaratory statement or notice of location can be recorded, then there is no valid location. "A location, to be effectual, must be good at the time it is made." Id. 285. The grant of the government does not attach unless the location has been made in pursuance of law.

The act of congress authorizing the exploration and purchase of the public mineral lands provides (section 2320, Rev. St.) that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. The discovery thus becomes a condition precedent to the location. Recording the notice or declaratory statement in the proper county is one of the acts of location, but the statute of the territory provides that before such a record can be made there must have been a discovery of a vein or lode of quartz or ore, with at least one well-defined wall. Rev. St. p. 590, § 874.

In the case of *Hauswirth* v. *Butcher,* 4 Mont. 307, S. C. 1 Pac. Rep. 714, we held that before there can be a valid location there must be a discovery.

Van Zandt v. *Argentine Min. Co.,* 2 McCrary 159; S. C. 8 Fed. Rep. 725. If, as held by the supreme court of the United States in the *Belk Case, supra,* a location, to be effectual, must be good at the time it is made, it follows that a location void at the time it is made, because of no discovery, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by a subsequent discovery on the claim located. The statute does not permit a location, and then a discov-

ery; but in all cases the discovery must precede the location. We cannot do away with the express language of the statute, and hold that there may be a valid location of a mining claim before there has been a discovery on the claim located. And especially we cannot maintain a location made by virtue of a shaft sunk on the patented claim of another person. If, subsequent to the location of the Camanche claim, a discovery was made thereon, then was the time to have made a valid location of the claim. It is immaterial to this inquiry whether the Smelter location was valid or not. This is an action to quiet the title of the respondents, and they must show a good title. This view of the case renders it unnecessary to discuss the other questions presented in appellant's brief.

The judgment is reversed, and the cause remanded for a new trial.

BREWSTER v. SHOEMAKER et al.

1900. Supreme Court of Colorado. 28 Colo. 176, 63 Pac. 309.

Action by Arthur Brewster against George W. Shoemaker and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

The action concerns a strip of ground in conflict between the Bootjack and Contention lode-mining claims, situate in San Miguel county. The Bootjack is the earlier location in point of time. When its owners (defendants) applied in the land office for a patent, plaintiff, the owner of the Contention lode, filed his adverse therein, and brought this action in its support. The facts material to the present controversy may thus be stated: The location of the Contention lode was made on May 1, 1898. No question is raised as to its validity, provided it was unappropriated public domain at the time of plaintiff's entry. The location of the Bootjack lode is claimed as of the 9th day of November, 1897, and also January 28, 1898. The first discovery of mineral was upon patented ground, and not within the boundaries of the Bootjack claim, as staked. It was therefore void. On the 28th of January, 1898, a valid discovery of mineral was made within these boundaries, and an amended location certificate filed. Both these discoveries of mineral were at a point about 250 feet below the surface, and upon the same vein, and were made in driving a tunnel; the latter discovery being at a point on the vein uncovered by running the tunnel further into the mountain. It was not a statutory tunnel,—that is, not located under the tunnel site act of congress,—but was driven by the owners of the Bootjack lode through patented property, not belonging to defendants, and into the territory in dispute, under an arrangement made between the patentee and the tunnel owners. The vein in the tunnel dipped about three

degrees from the vertical. A calculation was made, based upon the dip of the vein as thus disclosed, and at a point on the surface where, according to such calculation, the vein should come to the surface, a discovery notice was posted, containing the statement required by statute, and also a recital that a like notice, which is admitted, was at the place of discovery (describing it), and information was given how to reach it through the tunnel. Starting with this discovery stake on the surface as the initial point, the boundaries of the claim were designated, and the stakes set, as the statute prescribes. No tracing of the vein upwards was done, and no surface work performed, by the locators of the Bootjack claim. The vein found in the tunnel was not by actual exploitation shown to apex within the limits of the claim, but only as might inferentially appear from the calculation to which reference has been made. When the plaintiff appeared upon the ground and made his attempted location of the Contention lode, the posted notice and boundary stakes of the Bootjack were in place, and the location certificate was on file. Upon this state of facts, and with evidence as to other acts necessary to constitute a valid location of a mining claim, the case was submitted to the jury, under the instructions of the court, and a verdict returned for the defendants, upon which judgment was entered.

CAMPBELL, C. J. (after stating the facts).—Upon this appeal two questions only are important, and, as stated by appellant's counsel, they are: (1) Can a location admittedly void, because of an absence of a valid discovery of mineral, but regular in all other respects, be made good by a subsequent valid discovery of mineral within the limits of the location, made before the rights of third parties attach, but after the filing of the location certificate and all acts of location have been performed? (2) May a location of a valid mining claim be based upon an underground discovery of mineral made upon the dip of the vein at a distance of 250 feet below the surface, or any other distance, through a tunnel not statutory,—that is, not claimed under the tunnel site act of congress,—where the vein has never been opened upon the surface, or shown by actual working to have its apex within the limits of the claim as staked?

1. Plaintiffs rely upon Upton v. Larkin, 5 Mont. 600, 6 Pac. 66; Id., 7 Mont. 449, 17 Pac. 728,—which was afterwards affirmed in Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330. In the opinion, as reported in 5 Mont. and 6 Pac., supra, it was said that a location void at the time it is made, because of no discovery, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by a subsequent discovery on the claim located. Upon a second appeal of the same case, reported in 7 Mont. and 17 Pac., supra, the learned court seems to recognize the doctrine laid down by Mr. Justice Sawyer in the case of Jupiter Min. Co. v. Bodie Consolidated Min. Co. (C. C.) 11 Fed. 666, wherein it was said that in

such a case a subsequent valid discovery, made before any other person has acquired any rights, will make such a location good. But the court proceeds at the second hearing, with the case then in hand, to say that the evidence sought to be introduced at the trial to show a subsequent valid discovery was properly rejected because it appeared—or at least it was not clear that the contrary was true—that the subsequent discovery to which the evidence was directed was made after the application for patent was filed. And the court held that a patent ought not to issue upon a discovery made after application. It also declared that the offer of evidence was not made in good faith, but to enlist the sympathy of the jury. In the review of the case by the supreme court of the United States there is nothing said to give color to the position taken here by appellant's counsel. Whether the owners of the Bootjack lode, in connection with the second discovery of mineral,—the one within its exterior boundaries,—in January, 1898, supposed they were merely amending the former attempted location by correcting the description and filing an amended location certificate, or whether they intended to make, and supposed they were making, a relocation of an abandoned claim, is immaterial; for, before the rights of third persons, including the claimant, attached, it is admitted that they had taken all of the steps which, under the federal and state statutes, constitute an appropriation of a lode mining claim. The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim, and refile their location certificate, or file a new one. In the case of Beals v. Cone, 62 Pac. 948, we have ruled against appellant's contention. The United States circuit court of appeals for the Eighth circuit, in Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 608, in a case coming up from Utah, has reached the same conclusion. We know of no statutes of this state that require a different ruling. Other authorities sustaining our conclusion are Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 9 Morr. Min. R. 529, 1 Fed. 522; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Mining Co. v. Mahler, 4 Morr. Min. R. 390; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 4 Morr. Min. R. 411, 11 Fed. 666; 1 Lindl. Mines, § 335 et seq; Morr. Min. R. (9th Ed.) 28, and cases cited.

2. In Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521, it was held that when a tunnel claim has been duly located under the provisions of the acts of congress, and the owner thereafter discovers a mineral lode therein, he is not bound to make another discovery and location

of the lode from the surface, in order to be protected against a subsequent surface location of the same lode. This case was affirmed by the supreme court of the United States in Campbell v. Ellet, 167 U. S. 116, 17 Sup. Ct. 765, 42 L. Ed. 101. This, however, is not controlling of the proposition now under consideration. In the case at bar the defendants were not attempting to locate a tunnel site under the acts of congress. The mouth of the tunnel was not upon the Bootjack claim, and the entire work was done upon patented land by the plaintiffs under agreement with the patentee. The point of discovery was over 800 feet from the mouth of the tunnel. As well said by Mr. Morrison in his work on Mining Rights (9th Ed.) 30: "The fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location, subsequent to discovery." Certainly there is no requirement of the federal statute that a vein shall be discovered from the surface. The only requirement in that respect is that the place of discovery shall be within the limits of the claim. Under our statute (Mills' Ann. St. § 3154; Gen. St. 1883, § 2403) where a lode is cut at a depth of 10 feet below the surface by means of an open cut, cross cut, or tunnel, it is the same as if a discovery shaft were sunk on the vein to that depth. Gray v. Truby, 6 Colo. 278; Development Co. v. Van Auken, 9 Colo. 204, 11 Pac. 80. The question here is not whether a subsequent discovery on the apex of the lode would take precedence of the prior discovery on the dip, for there is no claim here that plaintiff's subsequent location is on the apex of the same lode on whose dip defendants' discovery was theretofore made. But the question is whether a valid location can be made by a discovery at a point 250 feet beneath the surface, when it is followed up by a marking of the boundaries on the surface as though the discovery had been made from the surface, and by the doing of the other acts which the statute requires, though no surface work is done, and no actual tracing of the vein to the surface attempted. The precise question has not, to our knowledge, been decided by a court of last resort, but we do not see why a location such as has been made by the defendants is not good. It has been held that where the discovery is made in a discovery shaft along the course of a vein, and the surface boundaries marked with reference to its course or strike as disclosed in the discovery shaft, the presumption is that the vein continues on the same course throughout the limits of the claim. When, as in the case at bar, the discovery is made underground upon the dip of the vein, it is fair to assume, in the absence of a contrary showing, that the vein extends upward at the same angle; and a marking of the boundaries by making the place at which the vein, if continued to the surface, would be disclosed, the initial point, is a sufficient compliance with the law. That the mouth of the tunnel was not upon the claim we do not consider important. That the tunnel was driven through patented property,

not belonging to the owners of the lode discovered, is something of which the plaintiff cannot complain. If the owners of the land through which the tunnel is driven give their consent thereto, a third person may not object. Sufficient notice was conveyed to the public of this location. The defendants not only placed in the tunnel, at the point of discovery, a discovery stake and notice, but also posted the discovery notice on the surface, containing not only the things required by statute, but in addition informing the public of the exact spot where the discovery was made, and furnishing information how to reach the same through the tunnel, where inspection might be had. We do not think it necessary, in a discovery which is made underneath the surface, that the locator shall, at the risk of losing his claim, demonstrate by actual working that the top or apex is within the limits of his location. In the absence of some proof to the contrary, the court will presume, as we have said already, that the vein continues in its upward course on the same angle to the surface; and if the locator selects and traces his boundaries with reference to this place on the surface, so as to include it within the limits of his claim, nothing further in this respect is required. On this last point Armstrong v. Lower, 6 Colo. 393, and Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283, though not deciding the precise question, are, in principle, authority for the holding here. The judgment of the court below is in harmony with our views, and it is affirmed.

SIERRA BLANCA MINING & REDUCTION CO. v. WINCHELL.

1905. SUPREME COURT OF COLORADO. 35 Colo. 13, 83 Pac. 628.

Action by the Sierra Blanca Mining & Reduction Company, a corporation, against Howard H. Winchell, in support of an adverse against defendant's application for a patent to the Cripple Creek lode mining claim. From a judgment for defendant, plaintiff appeals. Reversed.

GABBERT, C. J.—During the progress of the trial the parties stipulated that the conflict between the Keystone and Cripple Creek lodes should follow the result of the contention between the Jessie Mac and the Cripple Creek, and that no testimony need be given as to the Keystone conflict with the Cripple Creek lode. The controversy is thus narrowed to a determination of the rights of the parties in the conflict between the Jessie Mac and Cripple Creek. The judgment must be reversed, because of the refusal to give an instruction requested by plaintiff. This instruction was to the effect that if it appeared from the testimony that the locators of the Jessie Mac discovered mineral and posted notice of discovery, and that the loca-

tion of the Cripple Creek was based upon a discovery and location within the ground claimed by the Jessie Mac according to its notice of discovery, made within 60 days from the date such notice was posted, then the location of the Cripple Creek lode was invalid.

This was an important question, and no instruction was given which fully and clearly called the attention of the jury to this point. There was testimony on the part of the plaintiff (which does not appear to have been contradicted) to the effect that the discovery notice of the Jessie Mac was posted on the 30th day of June, 1899. The testimony on behalf of the defendant was to the effect that the discovery notice of the Cripple Creek was posted on August 28th following. The ground claimed by the latter was within the boundaries of the Jessie Mac, as indicated by the notice of discovery thereon. According to the stipulation of the parties, mineral in place was discovered in what was claimed to be the respective discovery cuts of the two claims. The other acts necessary to perfect a mineral location were contested, especially the sufficiency of the discovery work on the Jessie Mac lode. Whether or not, however, this work was performed was not controlling. If the discovery and location of the Cripple Creek was within the boundaries of the Jessie Mac, as evidenced by its discovery notice, and such discovery and location was made within 60 days of the date the Jessie Mac notice of discovery was posted, then the Cripple Creek location was invalid, and this invalidity would not be cured by the failure of the claimant of the Jessie Mac to perform the necessary discovery work.

A location based upon a discovery within the limits of an existing and valid location is void. Sullivan v. Sharp (Colo. Sup.) 80 Pac. 1054. A location notice properly made and posted upon a valid discovery of mineral is an appropriation of the territory therein specified for the period of 60 days. During this period, no one can initiate title thereto which would be rendered valid by the mere failure of the first appropriator to perform the necessary discovery work within the time prescribed by law. Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

Judgment reversed.

CHAPTER IV.

THE LOCATION OF LODE AND OF PLACER CLAIMS.

'The acts of location normally follow discovery and in general consist of (1) the posting of a discovery notice; (2) the sinking of a discovery shaft or its equivalent; (3) the marking of boundaries; (4) the posting of a location notice; (5) the recording of the proper papers."—Costigan, Mining Law, 176.

"The acts of location for placers * * * are in the main the same as those for lodes, though only a few states require discovery work on placers." Costigan, Mining Law, 247.

Section 1.—Discovery Work.

COLORADO STATUTES.[1]

Before filing such location certificate the discoverer shall locate his claim by:

First—Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice.—Rev. St. Colo., 1908, § 4197.

The discoverer shall have sixty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon—Rev. St. Colo., 1908, § 4199.

Any open cut, cross cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.—Rev. St. Colo., 1908, § 4198.

The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. Rev. St. Colo. 1908 § 4211 as amended Sess. Laws Colo. 1911 p. 515.

NORTHMORE v. SIMMONS ET AL.

(See post, p. 305, for a report of the case.)

BEALS v. CONE ET AL.

1900. SUPREME COURT OF COLORADO. 27 Colo. 473, 62 Pac. 948.

ACTION by appellant, as plaintiff in the court below, as the owner of the Tecumseh lode, in support of his adverse against the applica-

[1] For tables of statutory requirements of the various states, see the last accessible edition of Morrison's Mining Rights. In the 14th edition the tables appear at pp. 73, 253.

tion of appellees, as defendants, for patent to that portion of the Ophir lode in conflict with the Tecumseh. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

GABBERT, J.[2]—* * * The trial court excluded appellant's original certificate of location on the Tecumseh, which bore date May 3, 1892, was recorded May 6th of the same year, and claimed a discovery on April 18th preceding. The evidence was undisputed that no discovery of mineral in place, such as the law contemplates, was made upon the Tecumseh until April 20, 1894, at which time appellant relocated the premises and filed a certificate of location. His counsel contend that the original location certificate should have been admitted, because, a discovery having been made in the spring of 1894, it would relate back to the date of the original location. The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits. Section 2320, Rev. St. U. S. Until such discovery, no rights are acquired by location. The other requisites which must be observed in order to perfect and keep alive a valid location are not imperative, except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of location. But not so with discovery, for it is upon that act that the very life of a mineral location depends; and from the time of such discovery only would the location be valid, provided, of course, that others had not previously acquired rights therein. North Noonday Min. Co. v. Orient Min. Co. (C. C.) 6 Sawy. 299, 1 Fed. 522. Under this rule the original certificate of the Tecumseh was properly excluded; for the rights of appellant to the disputed premises only dated from April 20, 1894. * * *

The judgment of the district court is affirmed. Affirmed.

On Petition for Rehearing.

(November 19, 1900.)

PER CURIAM. * * * For a better understanding of the reasons why the ruling of the trial court in excluding appellant's original certificate of location on the Tecumseh was correct, the following facts should be borne in mind: The location of the Tecumseh under the discovery alleged to have been made April 20, 1894, was upon a discovery at an entirely different point from the discovery shaft upon which the original location was based. Under the new location a new discovery shaft was adopted. It became, in effect, an original location. The statute which permits amendatory or addi-

[2] Parts of the opinions are omitted. For some of such parts see post pages 187 and 389.

tional certificates to be filed provides that the filing of such a certificate shall not preclude the claimant under it from proving such title as he may have held under the original location certificate. Section 3160, Mills' Ann. St. For this reason the original certificate may, under certain conditions, be admissible. Such conditions, however, do not exist in the case at bar. Prior to the discovery alleged to have been made upon which the second location is based, no right to the premises in dispute was vested in appellant which entitled him to hold the ground as against third parties, because no discovery of mineral had been made before that time. A location without a discovery carries with it no rights. Upton v. Larkin (Mont.) 6 Pac. 66. The acts to establish a location which appellant had performed prior to the discovery in April, 1894, would have taken effect, in so far as they could have been utilized, as of the date of such discovery. Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 608. Appellant, however, did not rely upon any of these acts, but filed a new location certificate, including ground the boundaries of which were different from that described in the original certificate. This was a new location under a new and distinct discovery, and the act of filing a new certificate under this state of facts was a complete abandonment of all rights which might have attached to the steps taken under the original location. The appellees at all times relied upon a discovery claimed to have been made in the discovery shaft of the Ophir. Even if there was no mineral disclosed in this shaft at the time they filed their location certificate, the subsequent discovery which they claimed to have made in this shaft made this location valid, except as against intervening rights, from that date. Erwin v. Perego, supra. They never filed any other certificate, and the original certificate of the Ophir was therefore properly admitted. * * *

Counsel for appellant contend that, under instructions given and refused, the jury was precluded from considering the admitted fact that veins were exposed in two different shafts upon the Tecumseh, designated 2 and 3. What we said in the original, main opinion on this subject is withdrawn. In considering this question, these facts must be borne in mind: Whether or not a mineral-bearing vein was disclosed in the discovery shaft upon which the present location of the Tecumseh is based was controverted. No location was made upon either of the discoveries in shafts 2 and 3. The proposition of counsel for appellant is that if a well-defined crevice, although not bearing mineral in appreciable quantities, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim which disclose the mineral necessary to constitute technical veins. * * * The statute of this state which designates what shall be disclosed in the discovery shaft provides that it shall disclose a well-defined crevice at the depth of at least 10 feet from the lowest part of the rim of such shaft, at the surface. Section 3152, 2 Mills' Ann. St. It being conceded that the laws of

this state relative to the requirements of a discovery shaft are valid, it appears to us that the proposition upon which counsel rely is not tenable. If, as stated, the state statute is legal, it necessarily follows that the discovery shaft must expose the vein upon which the location is based, or at least disclose one, and therefore the mere discovery of some other vein within the limits of the claim cannot supply the absence of the one required to be exposed in the discovery shaft.[3] In other words, the proposition of counsel for appellant cannot be upheld unless the state statute is declared invalid, and the admission upon their part that it is not relieves us from the necessity of determining the effect of discoveries in shafts 2 and 3 of the Tecumseh. "Crevice," as employed in the statute relative to a discovery shaft, clearly means a mineral-bearing vein. It was so held by this court in Bryan v. McCaig, 10 Colo. 309, 15 Pac. 413. The circuit court of the United States for the district of Colorado has adopted the same view. Van Zandt v. Mining Co. (C. C.) 8 Fed. 725; Terrible Min. Co. v. Argentine Min. Co. (C. C.) 89 Fed. 583; Cheesman v. Shreeve (C. C.) 40 Fed. 787. Under these decisions, coupled with the admitted legality of the state statute, the fact that discoveries were made in shafts 2 and 3 upon which no locations were made does not in any manner affect the validity of the Tecumseh. * * *

The petition for rehearing is denied. Petition denied.

ELECTRO-MAGNETIC MIN. & DEVELOPMENT CO. v. VAN AUKEN AND OTHERS.

1886. SUPREME COURT OF COLORADO. 9 Colo. 204, 11 Pac. 80.

ACTION in support of an adverse. The appellees were the plaintiffs below.

Trial by jury, and verdict for the plaintiffs.

ELBERT, J.[4]—Section 7, Gen. Laws, 630, provides that "any open cut, cross-cut, or tunnel, which shall cut a lode at the depth of ten

[3] But see O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302. In Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759, 762, Norcross, C. J., for the court said: "Error is assigned in the finding made by the trial court that a vein, lode, or rock in place was discovered at the time of the Beehive location or in sinking the discovery shaft. It may be seriously questioned whether the evidence shows a discovery in the so-called 'discovery shaft.' The evidence, however, shows clearly that the defendant Pardy subsequently found valuable ore in other workings upon the claim, some of which ore was extracted and shipped and was of a value in excess of $100 per ton. It is a reasonable deduction from the evidence that the work done in other parts of the claim where ore was unquestionably discovered was more than the equivalent of that required for a discovery shaft. Conceding, without deciding, that this finding was erroneous, it does not, we think, affect the result in this case."

[4] The statement of facts is omitted.

feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon; or an adit of at least ten feet in, along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

In the case of *Gray* v. *Truby*, 6 Colo. 278, it was held that while the open cut, cross-cut, or tunnel must cut the lode at the depth of 10 feet below the surface, there was no such requirement in the case of an adit; that while there was no express requirement of depth, the development must always be such in its dimensions and character as to make it fairly the equivalent of a discovery shaft. In that case, the evidence showed that "the appellant, in lieu of a discovery shaft, opened an adit on his lode, beginning at the surface where the lode was discovered, and running in and along the lode a distance of twenty or twenty-five feet, where it obtained a depth of eight or nine feet below the surface." In this case the evidence shows that the defendant company, in lieu of a discovery shaft, opened an adit on its lode, beginning at the surface where the lode was discovered, and running in and along the lode (well defined and with mineral) a distance of fourteen or fifteen feet, where it obtained a depth of about nine feet; that the adit, at a distance of about six feet from the point of beginning, entered cover; and that the remaining nine feet were under cover and timbered. The court below rejected the excavation made by the defendant company as not a sufficient "open cut," because it did not cut the lode at a depth of 10 feet below the surface. There was no error in this. There was error, however, in rejecting the excavation as an adit because it was not under cover.

Every adit upon a hill-side, if continued, must enter cover at some distance from the point where the excavation begins,—at what distance will depend upon the inclination of the surface. Supposing the lode to outcrop, the point where the excavation enters cover, and the point where the lode was discovered, would never concur, except when the ground presented a perpendicular face. The term "adit," as the legislature understood it, is what must govern. In this section they were legislating with reference to an actual condition of things, —with reference to mining lodes so situated as to be reached by means of horizontal excavations. To an excavation "in and along a lode" they applied the term "adit," and fixed the point where "the lode may be in any manner discovered" as the initial point from which the development was to be measured. The point at which the excavation enters cover was not mentioned, and clearly was not in contemplation. The effect of the ruling of the court was to fix "cover" as the initial point of measurement. This is in derogation of the express provision of the statute. We find nothing in the technical meaning of the word that rejects such portion of the excavation at the mouth of the adit as may be in the nature of an open cut as not being a part of the adit. As the term is used in the statute, the legislature must have contemplated that, as to the 10 feet required,

it might be either open or under cover, or open in part and under cover in part, dependent on the nature of the ground. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the other provisions of the statute practically operative.

Although the discovery and location of the Willamette lode were prior in point of time to the location of the lode of the defendant company, there was much conflict in the testimony as to the depth of the discovery shaft. As the instructions of the court practically precluded a finding for the defendant company, it remains doubtful whether the verdict of the jury in favor of the plaintiff was not based upon that fact, rather than upon evidence showing a legal discovery shaft in the case of the Willamette. However this may be, the defendant was entitled to have the whole case submitted, under proper instructions.

The judgment of the court below is reversed, and the case remanded.[5]

MURRAY ET AL. v. OSBORNE ET AL.

1910. SUPREME COURT OF NEVADA. 111 Pac. 31.

ACTION by Sutherland Murray and another against Charles H. Osborne and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

An understanding of the facts of the main issues involved and the conclusions of the trial court may be obtained from the following extract from the opinion of the district judge:

"This action was brought to recover possession of and to enjoin the defendants from trespassing upon the Juanita and Juanita No. 1 mining claims, situate in the Old Spanish Belt, in this county and state. The plaintiffs allege in their complaint that ever since May 5, 1906, they have been the owners of and in the possession of this ground, and that on or about November 15, 1907, the defendants wrongfully entered upon the same and commenced mining thereon, and extracting and removing therefrom quantities of gold and silver bearing quartz, and that they extracted ores therefrom of the value of $2,000. * * * The defendants, by their answer, deny all of the allegations of the complaint and affirmatively allege that on or about September 5, 1907, they located the premises in controversy under the name of the 'Combination mining claim,' and allege that they entered into possession thereof under and by virtue of this location. They also allege that whatever rights the plaintiffs may have had to the ground were lost and forfeited through their failure to

[5] See Costigan, Mining Law, 182–183.

mark the boundaries, and to perform the requisite amount of discovery work in accordance with the statute in that behalf. Practically all of the testimony was directed to the failure of the plaintiffs to perform the discovery work upon the Juanita claim, and there seems to be no doubt but that all of the acts of location were performed upon the Juanita No. 1 mining claim. It will be unnecessary, therefore, to consider in detail the sufficiency of the acts of location upon the Juanita No. 1 mining claim, and I will therefore direct my observations entirely to the Juanita claim. The evidence shows without conflict that an old tunnel was run upon the Juanita claim about 40 years ago, but the evidence does not disclose by whom this work was done, or whether the parties who did it acquired any right or title to the ground or not. A number of witnesses were called by the plaintiffs who testified positively that the plaintiffs performed the necessary amount of discovery work upon the Juanita claim, and that this work consisted of cleaning out for a distance of about 15 feet the approach to the old tunnel, and of cleaning out the old tunnel for a distance of about 30 feet, and also of driving the tunnel ahead; that is to say, extending the old tunnel a distance of five or six feet. On the other hand, many witnesses were called on behalf of the defendants who testified with equal positiveness that they had visited the ground prior to and subsequent to the location of the Jaunita claim, and that this work had not been done. * * *

The evidence also shows that the roof of the tunnel is caving ground, and that a portion of it caved after this discovery work was done. It is possible, therefore, that after Phipps and Jacobs performed the discovery work, as they testified they did, a part of the roof of the tunnel may have caved and partly filled up the tunnel, and that the defendants' witnesses who visited the ground months afterwards may have seen the tunnel partly filled up and concluded from this that no change had been made in the tunnel, and that no work had been done therein. But, be that as it may, a number of reputable and disinterested witnesses testified that the work was actually performed, and this testimony established a prima facie case in favor of the plaintiffs, and the testimony introduced in behalf of the defendants is not in my judgment sufficient to overcome it. * * *

TALBOT, J. (after referring as above to the recited part of the opinion of the district judge).[6]—On behalf of appellant, it is urged that the evidence does not support the findings or judgment, which was rendered in favor of respondents and plaintiffs. * * *

As it appears from the opinion of the district judge that the tunnel was extended only 5 or 6 feet by the plaintiffs, and there is no evidence to indicate that it was extended further, was such extension in addition to the cleaning out of the cut for 15 feet and of the tunnel for 30 feet, as determined by the trial judge under the conflicting tes-

[6] Parts of the statement of facts and of the opinion are omitted.

timony, sufficient location work to meet the requirements of the statute in force at the time the Juanitas were located? Section 209, Comp. Laws, as amended in 1901 (page 97, c. 93), directs: "Before the expiration of ninety days from the posting of such notice upon the claim the locator must sink a discovery shaft upon the claim located to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show by such work a lode deposit of mineral in place. A cut or crosscut, or tunnel, which cuts the lode at a depth of ten feet, or an open cut along the ledge or lode equivalent in size to a shaft four feet by six feet by ten feet deep, is equivalent to a discovery shaft." Section 214 provides: "The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, in which case the record must give the depth and dimensions of the original discovery shaft at the date of such relocation, and erect new or adopt the old boundaries, renewing the posts or monuments if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken the record may state that the whole or any part of the new location is located as abandoned property. If it is not known to the relocator that his location is on an abandoned claim, then the provisions of this section do not apply." It is argued for appellants that, if the extension of the tunnel for less than 10 linear feet was sufficient to make a location good, the amount of earth required to be removed could be reduced to one shovelful. But, if it be conceded that the extension of the tunnel for a distance of six feet would not be sufficient, it remains for us to determine whether plaintiffs were entitled to credit for removing the caved dirt from the cut and tunnel, which, according to the evidence, may have been made 30 or 40 years previously, and possibly before the laws now controlling the location of mining claims were in force. If, after such a long period, the earth which had been caved and packed may not be considered in the nature of new ground, still if the locators removed several times the quantity of earth or rock defined by the statute and more than the equivalent of the labor necessary to do work in new ground, and this work was done in connection with the extension of the tunnel on the ledge and apparently all to the best advantage for the development of the mine and in good faith, we believe that was sufficient. The extension of the tunnel for 5 or 6 feet amounted to one-half or more of the 240 cubic feet of earth required by the statute to be excavated, and if, as testified by witnesses for the plaintiff, about 1,000 cubic feet was taken out of the tunnel, this necessarily resulted in the removal by the plaintiffs of several times the quantity of earth required to be excavated in new ground and apparently more than the equivalent of the work which

would have been required if it had been in new ground, and this work, including the extension of the tunnel, was as much or more for the benefit of the claim, and was a compliance with both the letter and the spirit of the statute.

There is no evidence indicating whether any location had been made, noticed, or staked on the ground at the time the tunnel was first constructed, and it does not appear that the locators of the Juanitas knew that the ground had been covered by an abandoned claim, or that they were aware of monuments or boundaries which would have made it possible for them to describe a part of all of the ground as being abandoned. Under these circumstances, and under the provision in section 214, Comp. Laws, that in any case where the whole or part of an abandoned claim is taken the record may state that all or part of the new location is on abandoned property, and, if it is not known to the locators that the location is on an abandoned claim, the provisions of that section do not apply, the certificate was not defective for failing to state that the location was made on abandoned ground. It has been held that such a statement acts as an estoppel, and prevents the locator making it from denying that the abandoned location had been properly made. Ordinarily forfeitures are not favored, and a very strict or severe construction ought not to be placed on the statute when the prior locators have proceeded in good faith and apparently have done all that is required by a fair construction of the laws relating to mining locations. * * *

The judgment is affirmed.

UPTON ET AL. v. LARKIN ET AL.

1888. SUPREME COURT OF MONTANA. 7 Mont. 449, 17 Pac. 728.

BACH, J.[7]—This suit was begun under Rev. St. U. S. § 2326, to determine the right of adverse claimants to certain mining property situated in Silver Bow county, Mont. The defendants had filed an application for patent to mining ground, including the ground in controversy, as the owners of the "Smelter Lode Claim;" the plaintiffs "adversed" the application, and thereafter commenced suit as required by the United States statute for adverse claimants, alleging title to the premises under a claim known as the "Comanche Lode Claim." The defendants deny plaintiffs' title, and claim title to the ground in controversy as part of the "Smelter Lode Claim." Trial was had in the district court, verdict was for the plaintiffs, and judgment was entered accordingly. A motion was made for a new trial, which was denied. The appeal is taken from the judgment, and from the order denying a new trial. We will consider in their order the

[7] Parts of the opinion are omitted.

alleged errors relied upon by the appellants, at least so far as the record will permit. * * *

The next error alleged is that the evidence shows that the Shannon lode claim as patented includes the discovery of the Comanche lode claim; and counsel for appellant cite *Gwillim* v. *Donnellan,* 115 U. S. 45, 5 Sup. Ct. Rep. 1110. In that case the discovery relied upon by the plaintiffs was entirely included within the boundaries of a claim that was patented after the plaintiffs' location; but in the case at bar testimony was introduced by plaintiffs tending to show that only a portion of plaintiffs' discovery shaft is included within the Shannon claim, and that the other portion is included within the line of the Comanche lode claim. The jury was instructed as to the law upon this point, at appellants' request. They were told that the discovery must have been made "upon the claim located; but, if the ground upon which the claim is located is appropriated ground,—that is to say, ground that has been previously located, and is at the time held as a quartz lode claim by others,—then such a discovery will not sustain a location, and any location made by virtue thereof will be void. And if you find in this case that the discovery of the Comanche lode claim was made upon the Shannon lode claim, then you will find that the location of the Comanche lode was void, and the plaintiffs acquired no rights thereunder." And there were other instructions to the jury to the effect that, if the discovery shaft of plaintiff was within the Shannon lode claim as patented, then plaintiffs could not recover. The jury find specifically that a portion of the discovery is south of the south boundary line of the Shannon claim as patented, and within the lines of the Comanche as located. There is evidence to sustain the finding, and such a finding of fact is sufficient to show a valid discovery; therefore the verdict of the jury cannot be disturbed upon that ground. * * *

The testimony shows that the Comanche lode claim was located in January, 1879; and, that in June, 1879, the Shannon lode claim, which lies north of the Comanche, was patented. The south line of the Shannon lode, as the testimony shows, runs directly through the discovery shaft of the Comanche, in such a manner that the shaft, with the exception of a strip about 19 inches wide, is included within the Shannon lode. Plaintiffs filed no adverse claim at the time that application was made for said patent. There is testimony showing that the vein upon which the discovery of the Comanche is based, dips from the north to the south. Such are the facts. * * *

Judgment and order denying a motion for a new trial are affirmed, with costs.[8]

[8] For a discussion of the question of whether two locations can be claimed by one discovery shaft so cut by the lines of the locations as to give part of the shaft and of the discovered strike of the vein to each, see Costigan, Mining Law, 179–180.

Section 2.—Posted Notices.

COLORADO STATUTE.[9]

Before filing such location certificate the discoverer shall locate his claim by: * * *

Second—By posting at the point of discovery on the surface a plain sign or notice containing the name of the lode, the name of the locator, and the date of discovery.—Rev. St. Colo. 1908, § 4197.

McCLEARY ET AL. v. BROADDUS ET AL.

1910. COURT OF APPEALS OF CALIFORNIA. 111 Pac. 125.

ACTION by C. E. McCleary and others against W. D. Broaddus and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

BURNETT, J.[10]—The action was brought to quiet title to a certain mining claim in Modoc county, known as the "Mountain Sheep Mining Claim." The defendants contend that the land is included within their locations, known as the Evening Star, White Quartz and Klondyke mining claims, and the determination of the case involves the question of prior location and appropriation as to the respective claimants, and whether up to the time of the trial plaintiffs had done everything required of them by law to maintain the validity of their claim. * * *

The parties are substantially agreed, except possibly in one particular, as to what steps are necessary to make and maintain a valid mining location. Indeed, the proceeding has been frequently the subject of adjudication, and concerning it there would appear to be little room for controversy. A general and comprehensive statement of what is required is found in the decision of the United States Supreme Court in Erhardt v. Boaro, 113 U. S. 535, 5 Sup. Ct. 564, 28 L. Ed. 1113, wherein it is said: "In all legislation, whether of Congress or of the state or territory and by all mining regulations and rules, discovery and appropriation are recognized as the source of title to mining claims, and development by working as the condition of continued ownership until a patent is obtained." The only uncertainty involved in the foregoing statement is as to the exact meaning of appropriation. Ordinarily this is effected in the following manner, as pointed out by the Supreme Court in Dwinnell v. Dyer, 145 Cal. 21, 78 Pac. 253, 7 L. R. A. (N. S.) 763: "The posting of notice at or near the point where the ledge is exposed; next the recording of notice; next the marking of boundaries." But, in the language of the learned Chief Justice: "It is indeed universally held that, when every act necessary to complete a location has been done

[9] See note 1 ante.

[10] Parts of the opinion are omitted.

before an adverse claim has accrued, the order in which such acts have been performed is immaterial."

Section 2324 (U. S. Comp. St. 1901, p. 1426) of the statutes of the United States makes it essential that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." In commenting upon this requirement the Supreme Court in Donahue v. Meister, 88 Cal. 131, 25 Pac. 1099, 22 Am. St. Rep. 283, declared that it is the "main act of original location." In Eaton v. Norris, 131 Cal. 563, 63 Pac. 856, it is said that "the ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim, or, to use the language of the statute, of such a character that the boundaries can be readily traced." As to the purpose of the posted notices, it is stated that they may be an aid in determining the situs of the monuments (Lindley on Mines, § 373), and therefore "constitute a part of the marking as does every other object placed on the ground for the purpose of marking it or otherwise, if it in fact does help to mark it."

Did the said Fisher [the grantor of plaintiffs], in compliance with these requirements of the law, make a valid location of the claim in question? There is evidence in the record that he made the discovery on the 1st day of August, 1905. * * * Again, he testified that on the 4th of August, 1905, one Lester Bonner wrote a notice of location, and Fisher signed it and posted it on a tree on the northeast corner of the claim, and built a monument there of stone and pieces of decayed wood about four feet high. He went back the next day and "put up the northwest and center monuments, and then prospected on the ground for quite a while. On August 17th I put up the northeast side center, the southeast corner, the south or southeast end center, and the southwest corner, and the southwest side center monuments of stone about three feet high so that the lines of the boundaries could be readily traced from those monuments." As to what was done on the 4th of August and subsequently Fisher is corroborated by other witnesses. There is evidence, then, that everything was done by Fisher which was necessary to effect a valid location.

There is some criticism of the fact that his notice was not posted until the said 4th of August, and that it was placed some distance from the point of discovery. As to this, it may be said that there is no evidence of the existence of any mining custom or regulation in the district relating to the subject, and there is nothing in the statute requiring the posting of notice on the day of discovery or prescribing where it shall be posted on the claim or at all. As we have already seen, the practice is as suggested by appellants, but the essential things are the discovery and the "marking of the location upon the ground so that the boundaries may be readily traced." And it is conceded that the discoverer has a reasonable time in which to so mark the location.

The claim of appellants, on the other hand, rests upon the discovery and the posting of a notice on the second day of August and the marking of the boundaries on a date subsequent to that of respondents. The location notice posted by appellants the second day of August and recorded on the first day of September was in the following form:

"Location Notice.

"Notice is hereby given, that we, undersigned citizens, having complied with the laws of the United States and local laws, have located and claim 1,500 feet in a northwesterly and southeasterly direction, and 300 feet on each side of this location monument. This monument is the beginning point of this claim. This claim shall be known as the White Quartz. Located the 22nd day of August, 1905."

It is admitted by appellants that their location notices did not sufficiently mark the boundaries of the claim, but their contention is "that location notices are sufficient to hold mining claims for a reasonable time in which to mark the boundaries." Ordinarily that is true, because the notice is evidence of an original discovery, or else the mining customs or rules require the posting of such notice. But here we have a prior discovery on the part of respondents and a prior marking of the boundaries. The discovery is manifestly the source of the title, and vests the discoverer with the prior right to complete his location. He could only lose this prior right to perfect his claim by a failure within a reasonable time to mark his location so that the boundaries could be traced upon the ground. But respondents not only proceeded within a reasonable time to perform this ultimate act, but before appellants made any effort to mark said boundaries.

The mistake of appellants is in the contention that the prior discovery must be accompanied by a prior posting of notice in order to vest the claimant with the prior right to complete his location. "But the mining law of the United States," as held in Anderson v. Caughey, 3 Cal. App. 26, 84 Pac. 224, "does not require the notice of location to be posted or recorded (Carter v. Bacigalupi, 83 Cal. 187 [23 Pac. 361]; Dwinnell v. Dyer, 145 Cal. 12 [78 Pac. 247, 7 L. R. A. (N. S.) 763]); and it is only where the local customs and rules of the miners of the district require these steps that they are necessary." * * *

We can see no reason to interfere with the conclusion of the learned trial judge, and the judgment and the order are affirmed.[11]

[11] In some jurisdictions it is customary to have only one posted notice which is known as the location notice; in other jurisdictions it is customary, or a statutory requirement, to have a notice known as the discovery notice put up at the time of discovery, and later, at or after the marking of boundaries, to have a posted location notice which defines more fully the general position of the claim.

TREASURY TUNNEL, MIN. & REDUCTION CO. v. BOSS.

1903. SUPREME COURT OF COLORADO. 32 Colo. 27, 74 Pac. 888.

SUIT between the Treasury Tunnel, Mining & Reduction Company and George C. Boss. From the judgment the company appeals. Reversed.

CAMPBELL, C. J.—This controversy concerns a strip of land included within two conflicting lode mining locations, the Maggie A. and the Liverpool. The original location of the Liverpool was first in order of time, and was made on the 23d day of May, 1887. On the 12th day of July, 1897, an attempt, at least, was made to locate the Maggie A., and it is conceded that in all respects it would be a valid location had not the discovery work been done within the exterior boundary lines of another mining claim previously patented. To cure this vital defect, the owners of the Maggie A. thereafter, and on the 15th of October, 1897, made a valid discovery of mineral upon the same vein and within 100 feet of the former discovery, and did the necessary discovery work within its exterior boundaries. Up to this time there was no conflict of territory between the two locations as thus made, but on the 4th day of October, 1900, the owners of the Liverpool location relocated the same, knowing at the time of the attempt of the Maggie A. owner to perfect his location by making a good discovery, and in doing so the boundaries were swung from their original position so as to include therein considerable ground not within the location as originally staked upon the ground, a portion of which is the ground in controversy here. The case was tried to the court without a jury, and findings of fact were made and judgment rendered in favor of the owner of the Liverpool lode. The court held as a matter of law that the Maggie A. was not a valid location at the time of the relocation of the Liverpool solely because its locator had failed to comply with what, in the judgment of the court, was a prerequisite to a valid location of a lode mining claim upon the public domain of the United States, viz., that, although a valid discovery of mineral was made, and the required discovery work done, within the limits of the Maggie A. location before the relocation of the Liverpool, yet the locator of the former did not post at the point of such second, and only, valid discovery on the surface of the ground a sign or notice, which it is said section 3152, Mills' Ann. St., requires shall be done. In every other respect the court considered the Maggie A. a valid location.

"The acts of Congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States, within the limits of his claim, of a mineral-bearing lode, and the distinct marking of the boundaries of

note on 158.

his claim, so that they can readily be traced." Erwin v. Perego, 93 Fed. 608, 35 C. C. A. 482. The acts of Congress provide, however, that the acquisition of mineral lands may be subject to local laws and the rules or customs of miners, so far as the same are applicable and not inconsistent with the laws of the United States. Our General Assembly has, in accordance with this permissive legislation, enacted a section 3150, Mills' Ann. St., that a location certificate must be filed within three months from the date of the discovery of mineral, which shall contain the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course of the lode, as near as may be; and has also declared, in section 3152, Id., that before the filing of such location certificate the discoverer shall locate his claim by (1) sinking a discovery shaft upon the lode, etc.; (2) by posting at the point of discovery on the surface a plain sign or notice containing the name of the lode, the name of the locator, and the date of discovery; (3) by marking the surface boundaries of the claim. This statute has not been assailed as invalid. It will be observed from the statement of facts that the sole legal question for decision is whether in this state, as against another and subsequent valid location, a prior lode claim is good in locating which all the federal and state statutory requirements have been complied with except the mere failure to place a discovery notice upon the ground at the point of the only valid discovery made on the claim, when such notice was posted at the point of a former, but invalid, discovery, as recited in the recorded location certificate, and when the boundaries remain the same after as before the true discovery.

One object of the requirement that the discoverer shall, before filing his location certificate, post at the point of discovery a notice, is that those wishing to make subsequent locations may thereby be advised of the ground already appropriated, and this serves to hold his ground until his location is perfected within the statutory time. After the location certificate is filed, the same object is secured in the shape of a permanent record which the statute requires shall contain not only the same facts which must appear on the sign or notice placed at the point of discovery on the ground, but still other data identifying the location. When filed in the proper office, the certificate takes the place of the notice on the ground, and after it is filed there is no necessity for posting or keeping at the point of a new and valid discovery, if the first alleged discovery is void, of a notice of what particular ground is claimed. The recorded notice sufficiently describes the ground claimed, and this recorded notice contains precisely the same things which the new notice, if posted, would include. Subsequent locators are already sufficiently and duly notified by that record, and the posting of a new notice would not give them any information, which the record does not already furnish. It is a well-

known fact that the boundaries as marked upon the ground and the notices thereupon posted within a very short time often disappear, and there is no requirement in the law that they shall be maintained or replaced by the locator in order to keep his location good. In Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 53 L. R. A. 793, 89 Am. St. Rep. 188, it was held that the order of time in which the several acts of location were performed is not of the essence of the statutory requirement, and that it is immaterial that the discovery was made subsequent to the completion of acts of location, provided only all the necessary acts are taken before intervening rights of third parties accrue; and it was there said that, if all these necessary steps have been taken before intervening rights accrue, it would be useless and idle ceremony, where the discovery follows all the other acts of location, for the locator again to locate his claim, or to re-file the old location certificate, or to file a new one. Where the locator has performed all the several acts of location except the discovery of mineral, and then makes a subsequent valid discovery, if no changes in boundaries occur, there is no reason why he should put at the point of the valid discovery a new notice, for sufficient notice is already of record. In construing our statute we must keep in mind the objects of the different statutory requirements, and when there has been substantial compliance therewith the statute is satisfied. In this case, before the Liverpool was relocated, notice by the recorded certificate had been given to the world of the segregation of the territory which the owners of the Maggie A. claimed; hence no rights of third parties would be protected or safeguarded by requiring the locators again to post at the point of a subsequent discovery a location stake or notice, for, if so placed, it would have on it only what the permanent record shows. We limit our decision to the facts before us. What may be the rule if the facts are essentially different from those in the case at bar, we are not called upon to determine.

The judgment of the district court being in conflict with this conclusion, it is reversed, and the cause remanded, with instructions to enter judgment in favor of the appellant with respect to the Maggie A. lode. Reversed.[12]

[12] See also McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. 54. On the effect of a failure to post notices, see Morrison's Mining Rights, 14 ed., 46.

BRAMLETT v. FLICK.

(See post, p. 228, for a report of the case.)

BERGQUIST v. WEST VIRGINIA-WYOMING COPPER CO.

(See post, p. 240, for a report of the case.)

GIRD ET AL. v. CALIFORNIA OIL CO.

1894. CIRCUIT COURT, S. D. CALIFORNIA. 60 Fed. 531.

ACTION by Richard Gird and J. C. Udall against the California Oil Company to determine conflicting claims to certain mining locations.

ROSS, DISTRICT JUDGE.[14]—The record in this case is a very voluminous one, and has been carefully examined and considered. The premises in controversy are oil-bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims. The defendant, California Oil Company, claiming to be the owner of a placer mining location called the "Razzle Dazzle," made application to the register and receiver of the United States land office at Los Angeles, in which district the land is situated, for a patent, against the issuance of which the plaintiffs, Richard Gird and J. C. Udall, filed a protest in writing, claiming that 17 5-10 acres of the Razzle Dazzle location are embraced by two previous mining locations, called, respectively, the "Whale Oil" and "Intervener No. 3," of which they are the owners; and thereupon, within the time prescribed by section 2326 of the Revised Statutes, and pursuant to its provisions, the contestants commenced the present action in the superior court of Ventura county, of this state, to determine the conflicting claims of the respective parties to the disputed premises, from which court the action was, on motion of the defendants, transferred to this court. * * *

The ground in controversy is situate in the county of Ventura, and within the Little Sespe petroleum mining district. * * *

It will be seen that by the first local rule respecting the location of claims the locator is required to post a notice on the claim, and to show it, together with the corners of the claim, to a witness, who is required to be a claim owner within the district, who must sign the notice as a witness, a copy of which is required to be given to the recorder for recordation. * * *

We see, then, that one of the essentials to a valid location within the Little Sespe petroleum mining district [according to the district rules] is the posting by the locator of a notice of location on the

[14] Parts of the opinion are omitted.

claim, signed also by a witness who is himself an owner of a claim within the district, and that such notice be recorded with the recorder of the district within 30 days after the making of the location; which record shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. * * *

It remains to consider the Razzle Dazzle location, which was made December 6, 1890, and under and in pursuance of which the defendant asserts the right to a patent from the government. Mason Bradfield, George J. Henley, and John Thompson were the locators of this claim. It was witnessed by J. G. Barker. The location notice * * * was placed in a small tin can, and the can placed by the locators on a little shelf in a rock mound, more than two feet high, erected by them near a tree on the claim, and a copy of it filed for record with the recorder of the district December 24, 1890. The evidence shows that the corners of the claim were marked by large rock mounds, considerably more than two feet in height, and near the northeast corner a diagram was cut in the rock, and measurements given by which the claim could be easily identified. The evidence, I think, clearly shows that the boundaries of the claim were so marked upon the ground as that they could be readily traced. It is said for the plaintiffs that this location did not comply with the local rules requiring the notice of location to be posted on the claim; that putting it in the tin can, and the can in the pile of rocks, was hiding, and not posting, it. I do not think so. As has been already said, one of the main purposes of the rule requiring the posting of the notice on the claim is for the guidance and protection of other miners seeking to locate claims. And it cannot be doubted that a miner traversing a mining region in search of mining ground who should see such a mound of rocks as usually marks a mining claim, with a tin can carefully placed in it, and who was seeking in good faith to inform himself, would fail to examine the contents of the can. The very fact that such a can was put in such a place would indicate to the miner that it was put there for a purpose, and that purpose the protection of a notice of information from destruction by the rains or from other causes. The objection made, in my opinion, is without merit. * * *[15]

It is further urged on the part of the plaintiffs that, independent of the Whale Oil location, the ground covered by the Razzle Dazzle lo-

[15] "Where only a memorandum notice is required, the [state] statute or [miner's] rule generally requires 'a plain sign or notice,' but there has never been any uniformity among prospectors in the details of the notice, or in the mode of posting it. It may be substantially complied with by writing on a blazed tree or on a board nailed at discovery, or by legible carving, or by any other rude but honest form of notice, so that it be intelligible and open to observation; but the loose practice of writing on a chip or stick thrown into the discovery hole is an attempt to evade or abuse the fair requirement of the law." Morrison's Mining Rights, 14 ed., 44.

cation was not at the time open to location by Bradfield, Henley, and Thompson, because it was then in the actual physical possession of David H. Irland, who was then, by his employes, engaged in putting down a well upon it, and that Bradfield and Henley were estopped from claiming the ground; the latter for the reason, it is said, that he was in the employ of Irland, and the former upon the ground that Irland was holding under him. But these positions are without support in the record. The evidence, I think, shows that Irland himself was in the employ of the defendant oil company, and that the work that he was doing on the ground in question at the time of its location was the defendant's work, and that the location made by Bradfield, Henley, and Thompson was in reality made for the defendant company, which, through mesne conveyances made almost immediately afterwards, acquired all of the rights therein of Bradfield, Henley, and Thompson. Irland never held under Bradfield any interest in the ground covered by the Razzle Dazzle location. * * * It appears, however, from the notice of location that the Razzle Dazzle claim contains 48.90 acres of land. It is declared by the act of May 10, 1872, c. 152 (17 Stat. 91), and the provision was afterwards carried into the Revised Statutes, that no placer location "shall include more than twenty acres for each individual claimant." Sec. 2331, Rev. St. If Irland was in the actual possession, and working the ground for himself, and Bradfield, Henley, and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because, in that event, the location would have been made upon ground, not vacant and open to location, but upon ground in the actual and adverse occupancy of another. But, as already observed, I think the evidence shows that Irland, Bradfield, Henley, and Thompson were, in truth, all acting for the defendant company at the time of the location of the Razzle Dazzle claim, and therefore that the location should be considered and treated, not as made by the three individuals, Bradfield, Henley, and Thompson, but as made for and in the interest of the defendant company, and must, under the provision cited, be limited in amount to 20 acres of land. That defendant has expended upon the ground in question, annually since its location, much more than the amount required by the statute, and much more than the $500 required by statute to entitle the applicant to apply for and obtain a patent, clearly appears from the evidence. For the reasons given, I am of the opinion that the right of possession of the disputed ground, to the extent of 20 acres, is in the defendant, and that the plaintiffs have no right thereto. There will be judgment in accordance with these views, with costs to the defendant.

SANDERS ET AL. v. NOBLE ET AL.

1899. SUPREME COURT OF MONTANA. 22 Mont. 110, 55 Pac. 1037.

HUNT, J. [16]—Plaintiffs (appellants here) sued the defendants (who are the respondents) to enjoin certain trespasses upon the Never Sweat lode claim, and to enjoin them from asserting title to any portion of said claim, the ownership and possession of which plaintiffs allege to be in themselves. Defendants denied the ownership and possession of plaintiffs, and the validity of the Never Sweat location, set up their own title to the Yukon lode claim, and prayed that the same be quieted in themselves. The trial was had before a jury, and testimony was heard on both sides. At the conclusion of the plaintiffs' rebuttal testimony, the defendants moved the court to instruct the jury to find in defendants' favor. The court granted the motion. Verdict and judgment were rendered in defendants' favor. Plaintiffs appeal from the judgment and an order overruling a motion for a new trial.

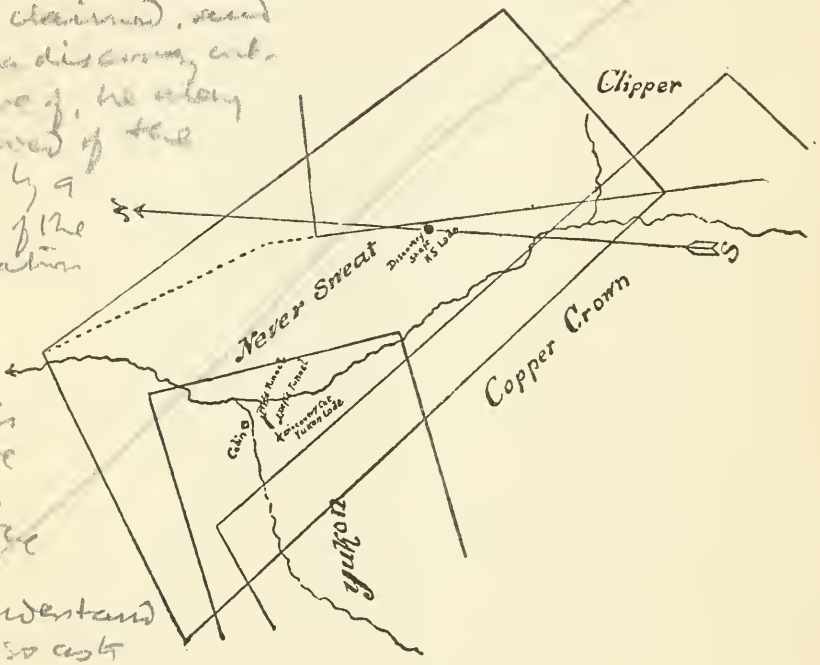
The ground of the defendants' motion to direct a verdict was that the plaintiffs had failed to make any proof of a compliance with the statute in respect to disclosing a well-defined crevice at the point of discovery of the Never Sweat claim for the depth of 10 feet. The court, however, did not sustain the motion upon the ground included therein, but held that defendants were entitled to a verdict because the plaintiffs were bound strictly by their location notice, and that, the plaintiffs having infringed upon the defendants' claim, they must be held to the lines of their location notice, and could not "get off onto some adjoining claimant's claim," and that, if they made a mistake, the prejudice lies at their door, and not at the door of the other parties upon whose rights they have infringed. To make the ruling of the court intelligible, and state the case on its merits, it is necessary to briefly recite what the evidence tended to show:

In August, 1897, W. H. Sanders, Henry Knight, and J. W. Knight, three of the plaintiffs, were working and prospecting in the vicinity of the ground in controversy. They were co-owners in the Copper Crown lode claim, which lies in a southwesterly direction, and adjacent to the Never Sweat. In a northeasterly direction from the Copper Crown there was an unappropriated triangular tract, approximately 600 by 900 feet. Plaintiffs, after endeavoring to trace float rock, finally succeeded, and followed the same up the hillside, where they commenced to dig, and found what appears to be the apex of the Never Sweat lode. On August 7th they made their discovery. They dug down about 2 feet, and on the surface cut a hole about 2½ by 3 feet, finding in the hole what one of the plaintiffs says was a ledge of quartz, in a northerly and southerly direction,

[16] Parts of the opinion are omitted.

as near as he could tell. This ledge was traced by the float on the surface, but there was no outcropping on either side of the hole. On August 7th, Sanders and Knight, for themselves and the other plaintiffs, posted a notice of location at the point of discovery. It was in the usual form of location notices. It named the quartz claim as the "Never Sweat," and continued as follows: "Extending along said vein or lode five hundred feet in a southerly direction and one thousand feet in a northerly direction, from the center of the discovery shaft (at which shaft this notice and statement is posted), and three hundred feet on each side from the middle or center of said lode vein at the surface; comprising in all fifteen hundred feet in length along said vein or lode, and six hundred feet in width." Plaintiffs testified that, when they made this discovery, they intended to take the fraction above referred to, and supposed that their claim was running pretty near north and south. After putting up this notice of location of the Never Sweat, plaintiffs left that vicinity entirely, to fulfill a contract elsewhere, and were gone about 30 days. During their absence, the defendants, in August, went upon the ground involved in this controversy, and located the Yukon mining claim. One of the locators testified that he found some rich float upon August 28th; that they saw the notice which was posted at the Never Sweat, and read it. Desirous of avoiding the locating of any ground unless it was vacant, the defendants started from the location of the Never Sweat, and went due north, determining where due north was by the shadow of the sun about noon of the day they made their location. After measuring due north about 350 feet, they measured 300 feet down the hill, and concluded that they had about reached the side line of the Never Sweat. Then they measured 50 feet more, to allow the Never Sweat locators room "to swing their claim a little; we thought 50 feet was enough." Then they measured 150 feet from their discovery, and located the Yukon claim easterly and westerly. Defendants ran a tunnel to the vein disclosing the same at a depth of 10 feet or more. They explored and concluded their staking within a period of 30 days after the posting of the Yukon notice. They filed a declaratory statement with the county recorder of Madison county within 90 days, but the date of filing such statement was subsequent to the filing of the plaintiffs' declaratory statement. When the plaintiffs got back to the Never Sweat, the defendants had completed the work of locating the Yukon, and had gone. Plaintiffs sunk a 10-foot shaft, established corner monuments, and recorded their declaratory statement of their location of the Never Sweat, all within 90 days after the posting of their notice as aforesaid. When they staked their claim, they located parallel to the Copper Crown, and included the discovery cut of the Yukon, which was 700 feet from the discovery point of the Never Sweat. The plaintiffs and the defendants had some conver-

sation in relation to the conflicts, but it never resulted in any agreement between them. Plaintiffs also commenced to run a tunnel some 27 feet north of the mouth of the defendants' tunnel, and prosecuted this work until they tapped the vein claimed by defendants as the Yukon, about 12 feet at the head of the defendants' workings. This work was done after they had staked their claim so as to include the point referred to. Then plaintiffs notified the defendants to keep off the ground. The defendants refused, and both plaintiffs and defendants continued to work until suit was brought. The accompanying diagram illustrates the ground in question. * * *



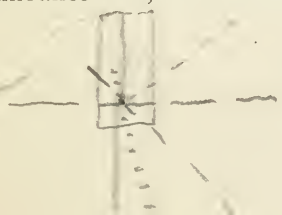
* * *

Taking up the [federal and state] statutes quoted, it will be seen that, to initiate and complete a mining location, five acts must be performed: (1) There must be a discovery; (2) there must be a definition of boundaries, as required by section 3611; (3) there must be a posting of notice at the point of discovery; (4) there must be development within 90 days from the date of posting the required notice; (5) there must be a declaratory statement filed in the office of the county clerk. The first essential was performed so far as the case here presents itself; and, it having been complied with, by immediately thereafter placing at the point of discovery a notice as re-

quired by statute, we believe that, until the expiration of 90 days thereafter, the plaintiffs' claim was valid and subsisting. All persons were warned of the claim of the Never Sweat lode, and, by the law, prospectors or others going within the limits included within the notice, to locate another claim, were trespassers. Coming after the discovery made, it was an appropriation of the land specified therein; and the two acts—discovery and posting the notice—constituted the origin of a good title to the Never Sweat mining claim. The condition of a continued ownership was development and a definition of boundaries, by marking a tree or rock in place, or by setting a post or stone at each corner or angle of the claim. * * *

The decisions of the supreme court of the territory and of the state rendered prior to the enactment of the statutes which require development work before boundaries are to be defined cannot control the present condition of the law. It is true, we think, that one of the objects in requiring a location to be marked upon the ground is to fix the claim, and to prevent floating or swinging, so that those who are in good faith looking for unoccupied ground may know exactly what has been appropriated; and we thoroughly agree with the principle announced in Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714, that the provisions of the law designed for the attainment of this object are very important, and ought not to be frittered away by construction; but, on the other hand, it is of equal importance that the miner have ample opportunity to perfect his mining location, in order that he may be protected in the full enjoyment of the rights accorded to him by the federal statutes. And it was for the purpose of affording the full enjoyment of these rights that the state statutes were passed, merely postponing the necessity for definition by marking the boundaries of his claim until he may have full opportunity to ascertain the strike or course of the vein or lode which he has discovered. The law has said that he must do all this within 90 days. Thereafter there can be no floating or swinging. But up to the expiration of that time, under the decisions quoted, we are forced to conclude that, if in good faith, he may use his discovery post as a pivot, and move his lines, at least in the general course of his vein given in his notice, so as to secure the full benefit of his discovery.

The distinction between the notice of discovery or notice of location required to be posted on the claim by section 3610, and the declaratory statement required to be filed for record by section 3612, is a substantial one, easily understood when the purpose of each is kept in mind. The notice of discovery should be, and usually is, posted immediately at the discovery hole, and often before the discoverer can possibly survey or even measure his ground. It is often done before even specific bearings are known. It is a simple announcement, and meant only to be a simple notice of a discovery,



and of an intention to claim the vein discovered, and, by posting it, the discoverer finds an easy and quick way of announcing his claim. Afterwards, though, when an opportunity is had to follow the vein on its strike, then the boundaries must be marked, and the claim must be described by reference to natural objects or permanent monuments. Then it is, too, but not before, that the evidence of the location must be preserved, by recording the declaratory statement containing such description of the location with reference to some natural object or permanent monument as will identify the claim. The notice of location is a protection to the discoverer during the process of location. "The record of a mining claim," says Judge Ross in Gird v. Oil Co., 60 Fed. 531, "when one is required, is intended to contain a more exact and specific description of the claim than the notice posted upon it." Gleeson v. Mining Co., 13 Nev. 465.

But respondents' counsel say, even if this be the law generally, yet in this case, plaintiffs having described their location by their notice as extending along the Never Sweat lode claim in a southerly and northerly direction from the center of the discovery shaft, they cannot now object to the acts of defendants in running the lines of the Never Sweat due north and due south, so as to allow defendants to perfect a location of the Yukon claim without the lines of the Never Sweat when so run due north and due south. This argument, of course, involves the proposition that the statute which requires a notice to be posted at the point of discovery, in which must be contained the general course of the vein or lode "as near as may be," demands an accurate description of the course of the vein by the points of the compass. We cannot adopt such a construction of the law without frittering away the underlying purpose of the statute to give to the discoverer 90 days in which to define the boundaries of his claim; for, if he must accurately state the general course of the vein in his notice posted at the point of his discovery, and at the time thereof, and is to be held to such course literally, the development work that he is required to do to demonstrate whether he has a claim worth further exploitation would be of no avail to him if it should demonstrate that the course of his vein varies even to the slightest extent from the general course given in his discovery notice. The statute requires only that he give the general course "as near as may be"; and where, as in this case, the course is given as southerly and northerly, and it subsequently appears by the surveyor's plats that the course of the vein is not due north and south, in the absence of proof of a lack of good faith we hold that such a notice is sufficient and valid.

In Book v. Mining Co., 58 Fed. 106, a claim was described as beginning at the southwest boundary of the West Justice and lying north of the Ennis mine. It was argued in the circuit court of the

United States that the locations were invalid, because notices were posted that did not correctly describe the lode. Judge Hawley said: "In construing notices of this character, where, under the mining rules and local regulations or state laws, such notices are required to be posted upon the ground, the courts are naturally inclined to be exceedingly liberal in their construction. Such notices are often drawn by practical miners, unaccustomed to legal forms and technical phraseology; hence the language used in the notices is often subject to more or less criticism by counsel learned in the law, and engaged in preparing documents in legal shape and form. Then, again, locations are often made without any accurate knowledge of the true course and directions which a compass would readily give, and mistakes in the notice as to the direction and course of the ground located often occur. But such mistakes do not invalidate the location. Positive exactness in such matters should never be required. It is the marking of the location by posts and monuments that determines the particular ground located." In that same case the location notice described the claim as extending 1,500 feet in a northerly direction. That was a mistake so far as the direction was concerned, as true north would have carried the line over and across another mine, instead of along the proper line, but the court said: "The word 'northerly,' under such circumstances, conditions, and surroundings, should not be interpreted as meaning due north. It includes and may mean any meridian line or course between a due north and northwest, and is defined and made certain by the posting of the stakes or the building of the monuments at the corners of the locations, or along the lines thereof. Such stakes and monuments would control the courses specified in the notice." West Granite Mountain Min. Co. v. Granite Mountain Min. Co., 7 Mont. 356, 17 Pac. 547; Gamer v. Glenn, 8 Mont. 379, 20 Pac. 654.

The respondents' counsel, in their brief, tell us that the court was impressed with the bad faith of these plaintiffs; but there is nothing in the record which informs us that the court considered that question at all, and we cannot presume that they acted in other than good faith.

To extend the discussion of these questions would be useless. * * * If the locator postpones marking his boundaries, he must be protected until the statutory time given him in which to do the acts required has elapsed; and until he has done what the statutes require, if his notice is valid, and he has a discovery, all persons proceeding to enter within the limits of the ground located do so at their peril.

If the question which we have discussed were res integra, we should be disposed to take a view of the federal statute (section 2324) differing from the rule of Erhardt v. Boaro, supra, and to agree with the California and Oregon cases cited, which

interpret the law as requiring an immediate marking of the location on the ground, so that the boundaries can be readily traced, or that a possessio pedis be had until they can be so marked within a reasonable time. There is a great deal to be said in support of the argument that congress never meant to allow the discoverer to stop his work, leave his claim, and postpone marking his boundaries for any period of time. The effect of the present construction is to give advantages to the discoverer beyond what the statute seems to fairly contemplate; and yet, if the right to postpone the marking of the boundaries for 90 days exists, there is no escape from the conclusion that the right to swing in good faith during that time goes with it. This is so because the reason for allowing the right to postpone is to definitely ascertain the strike, so that the discoverer may secure the benefit of his location before marking. Therefore, where the discoverer gives, as he must under the state statute, the general course of his vein in his discovery notice, and, notwithstanding those courses, he can postpone marking the ground for 90 days thereafter, so that the boundaries of his claim may be traced, it should necessarily follow that, if the course given in the notice posted is not the true course of the lode as ascertained, he may swing his claim so as to include within his boundaries ground that was not embraced in the notice of discovery, provided it includes the true course of the vein claimed. This right to postpone thus gives a discoverer a circle to move his claim in until he marks its boundaries, the radius of the circle being ordinarily a distance equal to the longest distance claimed from the point of discovery. This, for a time, practically withdraws a large area from the public domain, and compels prospectors to abide the time when the discoverer of a vein may elect to mark his ground. We doubt if congress ever intended such a consequence. The question, however, involves federal laws and statutes complementary of federal laws; so we feel bound by the interpretations of the United States courts, hence dismiss the subject with the foregoing observations of our own.

The application of what we have said necessarily leads to the conclusion that the defendants in this case had no right to embrace in the location of the Yukon any of the ground included within the boundaries of the Never Sweat, as the plaintiffs defined said boundaries, within the period of 90 days after their discovery of the Never Sweat. The judgment is reversed, and the cause remanded, with directions to grant a new trial.

WILTSEE v. KING OF ARIZONA MIN. & MILL. CO.

1900. Supreme Court of Arizona. 7 Ariz. 95, 60 Pac. 896.

Action by E. A. Wiltsee against the King of Arizona Mining and Milling Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Sloan, J.[17]—The King of Arizona Mining & Milling Company, appellee herein, made application in the United States land office at Tucson for patents to a group of mining claims situated in Yuma county, among them being one known as the "Homestake." The official survey of the Homestake showed that it conflicted with the Black Iron and the Iron Mask mining claims, owned by the appellant, Wiltsee, the area of conflict between the Homestake and Black Iron claims being 3.6 acres, and the area of conflict between the Homestake and Iron Mask claims being 5.6 acres. Wiltsee filed his adverse in the land office against the issuance of patent to the appellee to the ground in conflict, and within the time allowed by law in aid of said adverse brought suit. * * *

The Homestake mining claim location was initiated February 15, 1897, by one Eichelberger, who, as the testimony shows, called himself, "for convenience sake," Charles Edwards. On this date Eichelberger erected a monument, and placed therein the following notice: "Notice of Homestake Lode. We claim by discovery 1,500 feet along this vein and 300 feet on each side of this notice. We claim 150 feet in a westerly direction and 1,350 feet in an easterly direction. Located this day, the 15th of February, 1897, by Charles Edwards and H. B. Gleason." One of the disputed questions of fact upon the trial was as to whether, at the time Eichelberger initiated this location, he erected any other monument than the one in which the notice was placed. The appellant sought to prove that, in addition to the initial monument, Eichelberger erected one at the easterly end of the claim; that subsequently, after the location by appellant's grantors of the Black Iron and Iron Mask mining claims, he shifted the easterly end from the point where the original monument was claimed to have been placed to a point about 800 feet northerly, taking in, in this way, the area of conflict between the Homestake and the Black Iron and Iron Mask. The contention of the appellee was that no monuments were built at the time of the discovery and location of the Homestake except the initial monument, until late in February, when Eichelberger and one Guerra built one on the west end line; and that no monument was erected on the east end line of the claim until March 23d, when Eichelberger completed the location of the claim by the erection of the other monuments required to fully mark out the boundaries of the claim.

[17] Parts of the opinion are omitted.

The assignment of errors made by appellant presents two questions for our consideration: First. Assuming that Eichelberger changed subsequent to his discovery and initial location of the Homestake, and within the 90 days required of the locator to perfect his location, the course of his location, by moving the easterly end line thereof so as to include portions of the Black Iron and Iron Mask claims, under his location notice did Eichelberger possess the right to make such change, and take in any portion of the Black Iron and Iron Mask mining claims? * * *

The sufficiency of the notice of location made by Eichelberger posted on the claim at the time of the discovery of the lode is not raised by appellant. On the contrary, his contention is that the notice of location first posted defined with such particularity the course of the claim lengthwise that its direction could not thereafter be changed to the prejudice of intervening locations. The question, therefore, under this contention, becomes one of construction of the language used in the notice of location of the Homestake, "We claim 150 feet in a westerly direction and 1,350 feet in an easterly direction." Notices of location have been liberally construed by the courts. It is recognized that miners have put but scant opportunity of definitely locating and describing locations when these are made, as frequently happens, in remote and but little known localities; and the physical conformation of the country may be such as to require much time and labor to determine the true course and strike of the mineral-bearing vein or lode which may be the subject of the location. The same strictness in construing a clause in a notice of location required in construing a deed would obviously be unfair and unjust to the miner. Regard should be had to the meaning which the terms "easterly" and "westerly" are given by the miners. There is no rule of necessity, such as exists in the construction of a deed, which requires that the term "easterly," used without qualifying language, shall denote due east, and the term "westerly" shall denote due west. In the sense in which "easterly" is used by the miner and prospector, the term denotes the general course of a vein or location running nearer towards the east than any of the other cardinal points of the compass. A notice of location, therefore, which gives the course of the location as running westerly so many feet and easterly so many feet from a discovery shaft or point of discovery, until boundaries are definitely located by the erection of monuments, must be held to reserve from entry by subsequent locators the surface area which might be included within any location so made that, were a line drawn lengthwise through the center of said claim from the west center end through the point of discovery to the east center end of said claim, said line would lie at some point between east, 45° north, and east, 45° south, from the point of discovery. Should, however, the locator, at the time of posting his notice, in addition to giving the general course of his vein, place monuments at the center of each end

line, and thus definitely give notice to subsequent locators as to the meaning and intent of the language used in his notice as to the general course of his location, we think, under the law, he is bound by the location thus made and defined, so that he may not thereafter, and during the 90 days permitted for the perfection of his location, change the course of his location to the prejudice of intervening rights. It would be unjust to permit a locator who has thus marked out the course and direction of his location with certainty, to include subsequently, by a change in the course of his location, discoveries of mineral and parts of locations which others may have made relying upon the express representations of the prior locator as to the extent of his rights.

Applying these views to the case at bar, assuming that Eichelberger, at the time of posting the notice in question, erected no other monuments than the one at the point of discovery, his subsequent location of the east center end monument of the Homestake at the point now claimed for it was a substantial compliance with the notice of location, and no intervening rights to the ground in controversy were acquired by Wiltsee's grantors through their location of the Black Iron and Iron Mask claims. If, however, Eichelberger, at the time of posting his location notice, erected a monument at the center of the east end line, such end line could not thereafter be changed so as to include within the boundaries of the Homestake any portion of the Black Iron and Iron Mask which would not otherwise have been included had the east end line of the Homestake remained as established by Eichelberger. The record discloses a sharp conflict of evidence as to whether or not Eichelberger had, prior to the location by Cain and O'Brien, fixed the center of the east end line of the Homestake by the erection of a monument and the placing of a notice thereon. It was left, therefore, to the jury to determine this question of fact. * * * As we have seen, the location notice, as posted, did not definitely locate the easterly end of the Homestake claim, and under the law Eichelberger had the right, within 90 days after initiating his claim, to locate his easterly end of the Homestake at any point 1,350 feet in an easterly direction from the point of discovery, unless he had, prior to the location of the ground in conflict by Cain and O'Brien, definitely located the same by the erection of a monument and the placing of a notice therein.

We find no reversable error in the record, and the judgment is therefore affirmed.

UPTON v. SANTA RITA MINING CO.

SANTA RITA MINING CO. v. UPTON.

1907. SUPREME COURT OF NEW MEXICO.
14 N. Mex. 96, 89 Pac. 275.

ACTION [in support of an adverse brought] by James N. Upton against the Santa Rita Mining Company. From a judgment in favor of plaintiff, defendant appeals and brings error. Affirmed.

POPE, J.[18]—* * * A further assignment of error is that the court erred in withdrawing from the jury all testimony as to the location of the true west side line of Santa Rita No. 33, a patented claim immediately east of plaintiff's Slip location, and in refusing to give certain instructions embodying defendant's theory as to the effect of this testimony. A large part of the record in this case is made up of testimony as to where this side line was located. Plaintiff's witnesses indicated the original monuments to be 100 feet farther east than the defendant's witnesses. The relevancy claimed for this arises from the fact that, according to the Slip location, the location notice of that claim was placed upon its east side line, and at the west side line of the Santa Rita No. 33, as located on the ground by plaintiff. If, therefore, the contention of the defendant as to the location of the west line of Santa Rita No. 33 be well taken, plaintiff's location notice was 100 feet within patented ground belonging to the claim last named, and if, as contended, that fact invalidated the location, then the court erred in withdrawing from the jury the testimony as to the location of the Santa Rita No. 33; otherwise not. The territorial statute upon this subject (Comp. Laws, § 2286) provides that any person desiring to locate a mining claim must, among other things, post "in some conspicuous place on such location a notice in writing stating thereon the name or names of the locator." These regulations, being supplemental to and not inconsistent with the federal mining laws, are valid, and a failure to comply substantially with them renders the location void. Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336; same case sub nom. Lockhart v. Johnson, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. Ed. 979; Deeney v. Mineral Creek Co., 11 N. M. 279, 67 Pac. 724. The requirement

[18] The statement of facts is omitted and part only of the opinion is given. For another part see post, p. 333.

being that such notice shall be posted "in some conspicuous place on the location," was it satisfied in this instance? We are of opinion that the testimony, whether viewed from plaintiff's or defendant's standpoint, is to the effect that the posting was within the Slip claim as laid out. The position seems to be, however, that because a part of that location is (upon defendant's view of the evidence) within Santa Rita No. 33, and because the location notice is upon that part, therefore the notice is not upon the location within the meaning of the statute. We do not concur in that view. Granting that the Slip lode parially overlaps No. 33, that fact goes not to the locus of the Slip claim, but to its ultimate validity. The Slip claim was no less located as contended because ultimately a part of it may be found to be improperly upon another claim. The Slip location notice is no less upon such location because later it may be found that that portion of the Slip conflicts with another location. The question of whether a notice is within a location is to be determined by the boundaries of that location as laid out, not by the boundaries as they may be reduced by the subsequent ascertainment of conflicts with patented land. It is to be determined as of the date of the original location, not of subsequent date. In announcing this position, we have not overlooked the fact that the authorities are unanimous to the effect that a mining claim without a discovery point is void, and that, if such discovery be located in the first instance upon the land of another, or if subsequent to location they be lost to the locator by the patenting of that portion of his claim to another, his whole claim is lost. 1 Lindley on Mines, § 338; Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Miller v. Girard, 33 Pac. 69, 3 Colo. App. 278.

The distinction between that and the present case, however, is readily seen. There can be no mining claim without a discovery, for that constitutes the very basis of the title. If, therefore, the discovery be upon the land of another, any portion of the claim outside of such lands can derive no validity from the discovery within such lands, for non constat but that the lands without are totally lacking in mineral in place. A patent issued for them upon a discovery within the lands of another might result in alienation of the public land without any discovery to support it. So if, subsequent to his location, a party permits the portion of his claim containing his discovery to be taken away from him by another's unadversed application for patent, he is left with part of his claim, but no discovery to support it, and the claim is thus lost. The posting of a location, however, is not the basis of the title. It is simply a provision of law by which, in connection with the subsequent record, the world may have notice that the land described is being claimed as a mining location. We see no reason why such notice posted within the claim is ineffectual simply because that part of the location may,

through inadvertence or otherwise, overlap another claim. We must not overlook the fact that, as stated in Deeney v. Mineral Creek Co., supra, no appreciable time intervenes between discovery and the position of the location notice under our statue. In many instances, the boundaries of adjoining claims are doubtful by reason of destruction or obliterations of monuments, and in such instance, without accurate survey, such boundaries cannot be definitely ascertained. To hold that, because through honest mistake the small portion of the location upon which the notice is posted overlaps an adjoining claim, therefore the whole claim is void, is to declare that a miner must carry with him at the very start a skilled surveyor in order to be certain that his location is valid. We do not believe this to be within the spirit of the mining laws, which have ever held that, in the matter of location notices, the court will take a liberal, and not a narrow, view. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; 1 Lindley on Mines, § 355; Gird v. Calif. Oil Co. (C. C.) 60 Fed. 531; Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

Nor do the views here announced overlook the settled principle that a location held by patent or by prior location is property in the highest sense, and that no rights upon it can be initiated by trespass. We hold, however, not that a conflict with an adjoining claim by a subsequent locator confers any rights as against such prior claim, but that, as to the portion of the mining claim lying without such claim, the location is not rendered void by the mere fact that the notice may be upon such patented or previously located ground. As above pointed out, it is none the less within the lines of the location as made, and that is all the statute requires. The precise point here considered seems never to have been considered by the courts; but, in the case of Perigo v. Erwin (C. C.) 85 Fed. 904, the facts were not dissimilar. * * * In our judgment, therefore, the court did not err in withdrawing from the jury the immaterial issue as to the west boundary of Santa Rita No. 33. * * *

The judgment is accordingly affirmed.

BUTTE NORTHERN COPPER CO. ET AL. v. RADMILOVICH.

1909. SUPREME COURT OF MONTANA. 39 Mont. 157, 101 Pac. 1078.

CONSOLIDATED actions [in support of adverse claims] by the Butte Northern Copper Company against John Radmilovich, and John Stepan against the same defendant. Defendant appeals in each case from a judgment for plaintiff from an order denying a new trial,

and from an order amending the judgment. Order denying a new trial affirmed in each case.

Order in each case amending the judgment reversed, and causes remanded with instructions to strike out the amendment, and, as so amended, judgment affirmed.

HOLLOWAY, J.[19]—* * * At the conclusion of the evidence the court found that defendant had posted his notice of location of the Balkan lode claim three days prior to the time plaintiffs posted their notices of location. The finding proceeds: "In this case both parties proceeded to do and did all things necessary to make their locations valid, save that defendant's notice of location which was posted three days prior to plaintiffs' was not posted 'at the point of discovery' as required by statute, but was posted 60 feet west of a vein exposure in the Sea Lion cut. Further, his notice was of a north and south vein, while the above vein exposure was of an east and west vein." The conclusion of the court was that plaintiffs are entitled to the ground in controversy and to a patent therefor. A judgment was accordingly rendered and entered in each case in favor of the plaintiffs and against the defendant. * * * The defendant appealed. * * *

The trial court found that defendant was prior in time in posting his notice of location, but held the plaintiffs' locations prior and superior, because (a) defendant's location notice was not posted at the point of discovery, and (b) his notice described a north and south vein, while the vein exposure was of an east and west vein. The evidence is sufficient to sustain the finding of the court that the defendant did not post his location notice at the place of discovery, as required by section 3610 above. The evidence tends very strongly to show that he made discovery on March 15th or earlier; that he discovered mineral-bearing rock in place near the extreme westerly boundary of his claim and several hundred feet from the place where he posted his notice of location; that he also found mineral-bearing rock in place exposed in an excavation on the Sea Lion claim, some 50 or 60 feet from the place where he posted his location notice. We agree with counsel for appellant that the locator is not required to sink his discovery shaft at the point of discovery (O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302); but that question is not the one involved here. The question here presented is, must he post his notice of location at the point of discovery? The statute provides that he shall do so. The successive steps provided for are (1) discovery, (2) posting notice of location, (3) marking boundaries, (4) sinking discovery shaft, etc. In his article on Mines and Minerals, 27 Cyc., at page 564, in speaking of the place where the notice of location must be posted, Judge Clayberg says: "The place of posting the notice is generally designated by statute or local rule, the requirements of which must be complied with." As observed above,

[19] Parts of the opinion are omitted.

our statute requires that the notice shall be posted "at the point of discovery." The posting of this notice is done long before the discovery shaft is required to be sunk, and the only direction as to where the discovery shaft shall be sunk is that it shall be within the claim and upon the lode or vein. It cannot be said that the defendant complied literally or substantially with the statute in posting his notice of location at the point where it was posted. But our attention is directed to the fact that upon April 15th he sunk his discovery shaft at the point where he posted his notice of location, and that the vein was disclosed in this shaft. The record bears out this statement, and, but for the intervention of plaintiffs' rights, such discovery would have supported his location (27 Cyc. 558); but because of the intervention of the rights of plaintiffs, defendant's location must be held to be postponed until April 15th, the date when he posted his notice of location at the point of discovery. We do not agree with the conclusion of the trial court that a notice of location describing the course of the vein as north and south will not support a location of a claim along a vein the general course of which is east and west (Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037); but this is of little consequence in this case, in view of what is said above. * * *

The causes are remanded to the district court with directions to strike out the amendment in each judgment awarding costs, and, as so amended, the judgments will be affirmed. Each party will pay his own costs of these appeals.[20]

Section 3.—Marking the Location.

FEDERAL STATUTES.

Sec. 2324. * * * The location must be distinctly marked on the ground so that its boundaries can be readily traced * * *.—Rev. St. U. S., § 2324.

[20] In Doe v. Waterloo Min. Co., 17 C. C. A. 190, 70 Fed. 455, 461, Knowles, District Judge, said: "It is urged that the notice posted by Newbill was not placed upon the vein located. The evidence is that it was placed upon a part of the said vein,—a spur thereof. It was not necessary that the notice should be placed upon the croppings of the vein. If near by the same, it would be sufficient if it indicated the vein sought to be located. Phillpotts v. Blasdel, 4 Morr. Min. R. 341. Parks and his associates had no trouble in determining what was the vein Newbill sought to locate."

An error in the description contained in the notice by which the subsequent locator was not misled in tracing the boundaries is immaterial. Sturtevant v. Vogel, 167 Fed. 448. If by any reasonable construction the notice of location imparts to subsequent locators knowledge of the location, it is sufficient. Nicholls v. Lewis & Clark Co., 18 Ida. 224, 109 Pac. 846; Flynn Group Min. Co. v. Murphy, 18 Ida. 266, 109 Pac. 851.

COLORADO STATUTE.[21]

Before filing such location certificate the discoverer shall locate his claim by:
* * *

Third—By marking the surface boundaries of the claim.—Rev. St. Colo. 1908, § 4197.

Such surface boundaries shall be marked by six substantial posts hewed or marked on the side or sides which are in toward the claim and sunk in the ground, to-wit: one at each corner and one at the center of each side line. Where it is practically impossible on account of bed rock to sink such posts, they may be placed in a pile of stones, and where in marking the surface boundaries of a claim any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked, to designate the proper place."—Rev. St. Colo. 1908, § 4198.

DOE v. WATERLOO MIN. CO.

1895. CIRCUIT COURT OF APPEALS. 17 C. C. A. 190, 70 Fed. 455.

Before GILBERT, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

KNOWLES, District Judge.[22]—The Waterloo Mining Company, on the 12th day of September, 1889, made an application at the United States land office at Los Angeles, Cal., for a patent for the Red Jacket quartz lode mining claim. John S. Doe, the appellant in this case, within 60 days thereafter,—the time allowed by law,—filed in said land office his adverse claim to the claim made in the application of said company, in which he, the said Doe, claimed to be the owner of a portion of the premises described in said application as the "Red Jacket Lode Claim," and which portion he claimed to be the Mammoth lode claim. Within 30 days after filing his adverse claim said Doe commenced this action against said company in order to determine the right to the possession of that portion of the Red Jacket claim which is described as the "Mammoth Claim." The cause was commenced in the superior court of San Bernardino county, Cal., and on petition was removed from the same to the United States Circuit Court for the southern district of California. The cause was tried in the last-named court, and judgment rendered for the said company. The plaintiff then appealed the cause to this court.

From the evidence it appears that on the 26th day of March, 1881, one P. H. Newbill made the discovery of a mineral-bearing vein or lode in what was called "Grapevine Mining District," San Bernardino county, Cal. On that day he posted a notice upon said premises known as the "Red Jacket" lode or claim, claiming the

[21] See note 1, ante. See also relocation statute, p. 143, ante.
[22] Parts of the opinion are omitted. See ante, p. 75, for some of such parts.

right to locate 1,500 feet on said lead and 300 feet on each side of the same, and also claiming the right to have 20 days from said date in which to complete his boundary monuments. Subsequent to the said 26th day of March he went to the said premises with the view of marking the boundaries of his claim, but owing to sickness was prevented from so doing. It also appears he had some doubts as to how he should locate his claim. On the 11th or 12th of April, following, he made an agreement with G. B. Wallace, H. C. Parks, and J. B. Farrell to the effect if they would complete his location on said ground he would give them one-half of said claim. In accordance with said agreement, on one of said dates these parties did mark the boundaries of said Red Jacket claim by placing along the same, at the sides and ends thereof, some seven monuments of stone, about 2½ feet high. They posted a notice on the center monument on the east end line, describing the same, and which was a location notice. On some of the other monuments notices were placed indicating the corners of the location. The said location notice names the claim as the "Red Jacket Gold, Silver, and Nickel Quartz Mining Claim." The name in the Newbill notice was the "Red Jacket Claim." On the 6th day of April, 1881, six days before Parks, Wallace, and Farrell marked the boundaries of their location, and some 11 or 12 days after Newbill had posted his notice on the same, T. C. Warden and Dr. G. W. Yager located what they called the "Mammoth Lode." This included a part of the Red Jacket lode claim. There is no contention but that the boundaries of both claims were properly marked.

The first contention is that the location of the Red Jacket gold, silver, and nickel mining claim is not a completion of the claim made by Newbill. The supreme court of California, upon the same evidence, in the case of Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409, held that it was not. With the highest respect for that distinguished court, I cannot come to the same conclusion. Newbill undoubtedly made some kind of a mineral discovery on the ground located. He posted a notice on this ground claiming the right to locate some 1,500 feet on the same,—500 feet in one direction and 1,000 feet in another from the point where he posted his notice. He went upon the ground after this with the view of marking the boundaries of his location, and was prevented by sickness. He made an agreement, for a valuable consideration, with Parks, Wallace and Farrell, by which they were to complete his location. In pursuance of that agreement they did complete it. That was the contract and intention of all parties. The fact that a new location notice was posted by them on the ground, in which an addition of some descriptive terms was applied to the name given in the location notice of Newbill, cannot make it a new location. The ground was what was sought, not a name. There is no objection to changing the name of a location until after a record is made of the same.

There can be no objection to changing the description in a location notice, so other ground is not embraced, up to the date the location notice becomes a record. From necessity such a fact would often occur in the location of mining ground. A location notice generally does describe the ground located, and not what it is proposed to locate. The notice of Newbill should have no other force than a notice of discovery. As a notice of discovery and intention to claim and locate the ground described therein, it was certainly sufficient. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560; Marshall v. Manufacturing Co. (S. D.) 47 N. W. 293.

There is a considerable space in the brief of appellee devoted to maintaining that the notice and acts of Newbill were a sufficient location of the Red Jacket claim; that the one stake he placed upon the ground, claiming 500 feet one way and 1,000 feet in another way on the vien discovered, with 300 feet on each side of the same, was a sufficient marking of the boundaries thereof. In the location of quartz lodes, before the mineral act of 1872, such a mode of location was common. Since that date, I know of no instance in which such a location has been sustained. Since that date, it has generally been held that in some way the location should be made in the form of a parallelogram, and the location so marked that its boundaries can be readily traced. The cases of Golden Fleece, etc., Co. v. Cable Consol., etc., Co., 12 Nev. 312-330; Book v. Mining Co., 58 Fed. 106; Gleeson v. Mining Co., 13 Nev. 442-558; Holland v. Mining Co., 53 Cal. 149; Gelcich v. Moriarty, Id. 217,—maintain fully that such a location as is claimed for Newbill is insufficient. It is also claimed that the above-named cases decided by the supreme court of California were overruled by the same court in the case of Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361. I do not think this should be asserted. The question presented in the last case was the sufficiency of a location notice under the local rules of the district, and not as the marking of the boundaries of a claim. Certainly it does not purport to overrule the former cases. Many cases might be cited from other states and territories showing that such a location is invalid. * * *

The next point presented is, were the boundaries of the claim marked and the location completed within a reasonable time after the discovery by Newbill? * * * There is no doubt but the discoverer of a mineral vein should have a reasonable time after the discovery of his vein in which to complete his location embracing the same. * * *

Without consulting what has been considered by rules and regulations or statute law upon the subject as to the time within which after discovery the location of a mining claim should be completed, we would say that what would be a reasonable time for such completion would depend upon the circumstances affecting the ability

of the locator to properly define his claim. The sickness of the locator which would prevent his performing the necessary work to accomplish this cannot be classed as such a circumstance. Jones v. Anderson, 82 Ala. 302, 2 South. 911; 19 Am. & Eng. Enc. Law, p. 1090. If sickness would excuse the performance of the necessary work in completing a location, for how long a time would it act as an excuse? If for any time, why not for a very long and indefinite time? I think the circumstances should be such as pertained to the ground to be located, its character, the means of properly marking the ground sought to be located, and the ability to properly ascertain the dimensions and course or strike of the vein on account of which the location is made. Courts that have been called upon to try mining cases have observed the haste with which such locations are made, and the want of the requisite care in so marking the boundaries of the locations concerning which disputes arise as to properly embrace the apex of the vein which is sought to be appropriated. Recurring to the evidence as to the character of the ground where this location was made, and as to the vein on account of which the location was made, and we find that the ground was upon a rough mountain side; that the vein was exposed about 400 feet in one place and about 40 in another. It does not appear that the dip of the vein was exposed at any point. There was a large amount of quartz upon the side of the mountain. One thousand feet of the vein was covered. Under these circumstances I think 20 days was a reasonable time to allow for the completion of the Newbill location. The fact that neither he nor his associates made any extended researches on the ground in order to fully show the course of the vein makes no difference. They may have been fortunate in marking their boundaries. In affording a reasonable time in which to complete a location, the object is to eliminate, as far as circumstances will permit, guesswork in the location of quartz lodes. The question is, what would be a reasonable time for a competent locator to have, under all the circumstances, in which to complete his location? And, as I have said, I think 20 days would not be unreasonable. When the Red Jacket claim was properly located, on the 12th of April, 1881, this location related back to the date of the discovery by Newbill, on the 26th of March preceding. Gregory v. Pershbaker, 73 Cal. 120, 14 Pac. 401. The location of the Red Jacket must be held, then, to be prior to that of the Mammoth. * * * The decree is affirmed, with costs of appellee.[23]

[23] But in Patterson v. Tarbell, 26 Ore. 29, 37 Pac. 76, 79, Bean, J., for the court, said: "It would seem that the discoverer of a lode or vein of rock in place, bearing precious metals, in the absence of some local rule of miners or legislative regulations allowing some time for exploration, must immediately locate his claim by distinctly marking the same on the ground, so that its boundaries can be readily ascertained, in order to hold it against a subsequent valid location, peaceably made; and, the defendants having failed to

OREGON KING MIN. CO. v. BROWN et al.

1902. CIRCUIT COURT OF APPEALS. 55 C. C. A. 626, 119 Fed. 48.

In Error to the Circuit Court of the United States for the District of Oregon.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge.[24]—The Oregon King Mining Company, the plaintiff in error, commenced proceedings in the United States land office at The Dalles, Or., to procure a patent for a certain mining claim, called the "Silver King." At the time of its application the company was in possession of the claim, and is so still. The defendants in error contested the application, and, in support of their adverse claim, commenced, pursuant to the provisions of section 2326 of the Revised Statutes [U. S. Comp. St. 1901, p. 1430], the present action in the court below to determine the conflicting claims to the ground, in which action judgment passed for the plaintiffs therein, the defendants in error here.

The plaintiff in error claims the ground by virtue of a location thereof made on the 24th day of June, 1898, by one G. M. Wilson. The defendants in error claim it under a location made on the 31st day of January, 1899, by T. J. Brown and Columbus Friend. Substantially the same ground is covered by both locations. That made by Wilson he called the "Silver King Mining Claim," and that made by Brown and Friend was called by them the "St. Elmo Mining Claim." The case shows that Brown, in connection with Friend, first undertook to locate the ground in controversy on the 10th day of March, 1897, but it is conceded that he did not make any valid location thereof prior to January 31, 1899, so that, if the location

comply with the law in so locating their claim, they are not entitled to the possession of the ground in dispute as against the plaintiffs, who made a valid location. Requiring the discoverer of a mine to proceed diligently to complete his location, without waiting to trace the cause or strike the vein or lode, may, in some instances, work an apparent hardship; but, until the matter is provided for by some local rule or regulation, it is better, whatever the effect may be in particular cases, that the rule should be settled, and thus prevent as far as possible the uncertainty in titles to mining claims, and the strife and litigation among miners, which would necessarily follow if the discoverer is allowed an indefinite time in which to develop his lode or vein, which in many instances would require much time and labor and a large expenditure of money. If, during such development or exploration, he is allowed to hold a floating grant to surface ground 600 by 1,500 feet in size, with the right to definitely locate the same as he may subsequently determine, it would create great uncertainty in mining titles, increase litigation, and often defeat the purpose and object of the law throwing open the mining lands of the country to occupation and purchase."

[24] Parts of the opinion are omitted.

made by Wilson on June 24, 1898, was valid (to whose rights the plaintiff in error succeeded), the plaintiff in error is entitled to the property; it having entered into the possession thereof under Wilson's location, and having since retained possesion and worked and developed the claim, expending in such work and development a large sum of money. * * *

Wilson and Hubbard and Knight thereafter from time to time did work upon the ledge, consisting of small cuts, and took ore therefrom, which upon assay showed considerable value in gold and silver, and on the 24th day of June, 1898, put up at the east end of the Silver King claim a mound of rock taken from one of the cuts made by them, in which they placed a notice reading as follows:

"State of Oregon, County of Crook—ss: Know all men by these presents that I, the undersigned, have this 24th day of June, 1898, claimed, by right of discovery and location, 1,500 feet of linear and horizontal measurement in length, and 600 feet in width, a quartz ledge along the vein or lode thereof, 1,500 feet of said claim lying and being in westerly direction from the mound of stone of the discovery monument, with all dips, spurs, variations, and angles; said claim being more particularly described as follows: Situated on Sec. 30, T. 9, R. 17 E., Crook county, Oregon, near the Trout creeks. This claim shall be known as the 'Silver King.' Also I claim all water right to work the same.

"Discoverer:
"G. M. Wilson.

"Witnesses:
"J. F. Hubbard.
"John Knight."

* * *

The fundamental questions contested at the trial in the court below, and presented by the record here, are: First, whether the Wilson location, made June 24, 1898, was properly marked upon the ground; and, second, if it was not, whether a copy of Brown's location of January 31, 1899, was recorded as required by the act of the state of Oregon of October 14, 1898. Other questions, of a minor character, also arose during the trial in the court below, which it will be uncessary to consider, in the view we take of the case.

The case was tried with a jury. In the answer of the defendant to the plaintiff's complaint, it was, among other things, alleged: That Wilson, having on the 24th day of June, 1898, discovered therein a vein of rock in place, carrying precious metals, located a claim called the "Silver King Mining Claim," embracing the vein; so marking it that its boundaries could be readily traced; the same being "by the erection of a monument of stone at least two feet in diameter at its base, and four feet in height, which said monument was so erected and located at the east end center of said Silver King mining claim, and at the east end of said ledge, lead, lode, or vein of rock in place, and by making a cut into said ledge, lead, lode, or vein, and along the same, which said cut was 5 feet wide, 8 feet long, and 6 feet deep

at the upper end thereof; and said Wilson then and there placed in a conspicuous place in said monument, at the east end center of said claim, a notice in words and figures" as hereinbefore set out. "That, at the point where said monument was so erected, said ledge, lead, lode, or vein of rock in place crops out, and forms a ridge upon the surface of the ground, and is plainly visible, and can be readily traced and followed in a straight line from said point for a distance of over 400 feet therefrom, in a westerly direction; said ground being barren and devoid of timber or vegetation, excepting only a scanty growth of grass. That the said G. M. Wilson at said time further distinctly marked said claim and the location thereof upon the ground, by placing a square stake at the west end center of said claim, and in a line with said ledge, lead, lode, or vein of rock in place, and an extension thereof, which said square stake was firmly set in the ground, and projected at least 3 feet above the ground, and was at least 4 inches in diameter, and was so set in the ground that one of the sides thereof faced towards the said monument of stone at the east end center of said claim, and said face of said stake was plainly marked 'Silver King,' '1,500 feet easterly,' and the north face of said stake was plainly marked '300 feet northerly,' and the south face of said stake was plainly marked '300 feet southerly.' The said G. M. Wilson set said stake in a line with the croppings of said ledge, lead, lode, or vein of rock in place, and upon the extension thereof, and intended to set the same 1,500 feet westerly along said ledge, lead, lode, or vein, and an extension thereof from said monument of stone at the east end center of said claim, but miscalculated the distance thereof, and set said stake 1,368 feet westerly from said east end center monument. That said G. M. Wilson further at said time distinctly marked said claim and the location thereof upon the ground, by sinking a shaft upon the line of said croppings of said ledge, lead, lode, or vein of rock in place, and on a direct line between said discovery monument and said west end center stake, which said shaft was sunk to a depth of nine feet, and at a point about 400 feet westerly from the east end center, and also by running a crosscut about 50 feet long, connecting with said shaft."

At the trial the defendant (plaintiff in error here) requested the court to instruct the jury that if Wilson marked his claim as alleged in the answer, such marking was a sufficient compliance with section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426], and that Wilson's location, so far as marking was concerned, was therefore valid, which instruction the court below refused to give, to which action the defendant excepted. The court below, in more than one instance, against the objection and exception of the defendant, refused to determine the validity or invalidity of the Wilson location as a matter of law, but submitted that question to the jury as one of fact, under instructions as to the law by which

they should be guided in determining the question. Concerning the necessary marking of the claim, the court said in its instructions:

"The test is not as to whether the notice would so describe the claim that it could be surveyed. The lines themselves must be indicated by physical marks or monuments, so that one unfamiliar with surveying, and without the aid of measuring instruments or a compass, can readily see by the marks themselves just what is claimed; that is to say, it is my opinion that it is not sufficient that a surveyor might go and find this claim, for the reason that the object of this notice and marking is to advise people who are in that country, and who are not surveyors, and in cases where it is not practicable to have that kind of service, to determine by observation, from what has been done upon the ground, that there has been a location, and its boundaries. The plain provision of the statute which requires a mining location to be so marked upon the ground that its boundaries can be easily traced is salutary and beneficial, and is not to be frittered away by construction. After the discovery, the marking is the main act of location. Without it the location is invalid."

The most of what was there said by the court below was correct and proper. The vice is in that part of the instruction in which the jury was clearly and distinctly told that the lines themselves must be indicated by physical marks and monuments, so that one unfamiliar with surveying, and without the aid of measuring instruments, can readily see just what is claimed. The opinion entertained and given effect by the court below in its rulings in respect to the necessity of indicating the boundaries of the claim by physical marks or monuments, in order to constitute a valid location, is further shown by its refusal to give the following instructions requested by the defendant, to which exceptions were reserved:

"In regard to the manner of marking, I call your attention to the fact that the law does not require the boundaries of the claim to be marked. It is the location that must be marked, and the law does not say how it shall be marked, excepting that it must be distinctly marked, so that its boundaries can be readily traced; that is, the location must be designated by some means placed upon the ground, so that any one visiting the ground, and endeavoring to do so, can readily trace the boundaries of the location made."

"At the time Wilson attempted to make his location, the law did not prescribe or define what kind of markings he should make, or upon what part of the ground or claim he should place the same. He was not required to place such markings at the corners of the location. Any marking on the ground claimed, by means of stakes, mounds, and written notices, is sufficient, if thereby the boundaries of the location can be readily traced; and in this connection you have a right to take into consideration the character of the ground, and any natural conditions that may aid the markings placed upon the location in determining its boundaries, or which may assist in the tracing of the boundaries from any markings which may have been placed upon the same."

The statute under and by virtue of which such locations are made does not say that the boundaries shall be indicated by physical marks or monuments, nor in any particular or designated manner. The re-

quirement is that the location shall be so distinctly marked on the ground as that its boundaries may be readily traced. Section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426]. It has been many times decided that any marking on the ground, whether by stakes, monuments, mounds, or written notices, whereby the boundaries of the location can be readily traced, is sufficient. The latest decision by the supreme court of the United States to that effect is found in the case of McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331, in which the notice described each of two locations as "a placer mining claim 1,500 feet, running with the creek, and 300 feet on each side from center of creek known as 'McKinley Creek,' in Porcupine mining district." "These notices," which it appears were written upon a stump or snag in the creek, said Mr. Justice McKenna, delivering the unanimous opinion of the supreme court, "constituted a sufficient location. The creek was identified, and between it and the stump there was a definite relation, which, combined with the measurements, enabled the boundaries of the claim to be readily traced."

In Gleeson v. Mining Co., 13 Nev. 442, 462, the court, speaking through Beatty, J., said:

"The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue. We concede that the provisions of the law designed for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But it must be remembered that the law does not, in express terms, require the boundaries to be marked. It requires the location to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries. They are only a means by which the boundaries may be traced. Why not, then, allow the same efficacy to the marking of a center line in a district, where the extent of a claim on each side of the center line is established by the local rules? It would be safer, and therefore better, to comply with the recommendations of the land office, and erect stakes at the corners of the claim; but, if the grand object of the claim is attained by the marking of a center line, we can see no reason why it should not be allowed to be sufficient. In this case the locators of the Paymaster marked the center line of their claim on the 10th of October, 1872. No miner, no man of common intelligence acquainted with the customs of the country, could have gone on the ground and seen the monument, notice, and work at the discovery point, and the two stakes, one three hundred feet southeast of the location monument, marked, 'Southeasterly stake of Paymaster,' the other twelve hundred feet northwest of the location monument, and marked, 'Northwesterly stake of Paymaster,' in a line with the croppings and with the discovery point, without seeing at a glance that they marked the center line of the claim. By the rules of the district and the laws of the land, he would have been informed that the boundaries of the claim were formed by lines parallel to the center line, and three hundred feet distant therefrom, and by end lines at right angles thereto. With this knowledge, he could easily have traced the boundaries, and, if such was his wish, ascertained exactly where he could locate with safety."

Judge Sawyer, in instructing the jury in the case of North Noonday Min. Co. v. Orient Min. Co. (C. C.) 11 Fed. 125, 6 Sawy. 299, 310, upon the point in question, said:

"To make a valid location under the statute, it is required that 'the location must be distinctly marked on the ground, so that its boundaries can be readily traced'; but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground claimed they shall be placed. Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. If the center line of a location of a lode claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width upon each side of such line, such location of the claim is so marked that the boundaries may be readily traced, and, so far as the marking of the location is concerned, is a sufficient compliance with the law."

In speaking to the same point, Judge Hawley, in the case of Book v. Mining Co. (C. C.) 58 Fed. 106, 113, said:

"All the authorities agree that any marking on the ground by stakes, monuments, mounds, and written notices, whereby the boundaries of the location can be readily traced, is sufficient."

See, also, Haws v. Mining Co., 160 U. S. 303, 318, 16 Sup. Ct. 282, 40 L. Ed. 436; Southern Cross Gold & Silver Min. Co. v. Europa Min. Co., 15 Nev. 383; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 667; Hauswirth v. Butcher, 4 Mont. 308, 1 Pac. 714; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728; Pollard v. Shively, 5 Colo. 309; Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66; Du Prat v. James, 65 Cal. 555, 4 Pac. 562; Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594.

The error committed by the court below, above indicated, necessitating the reversal of the judgment and the remanding of the case for a new trial, it becomes necessary to decide but one other of the questions presented by the appeal; and that is whether or not it be necessary that the copy of the notice of location required by the Oregon statute to be recorded be a literal and exact copy of the notice posted. We think it clear that it need only be a substantial copy. Gird v. Oil Co. (C. C.) 60 Fed. 531; Myers v. Spooner, 55 Cal. 257; Doe v. Mining Co., 17 C. C. A. 190, 70 Fed. 457; Metcalf v. Prescott (Mont.) 25 Pac. 1038; Preston v. Hunter, 15 C. C. A. 148, 67 Fed. 996; Carter v. Bacigalupi (Cal) 23 Pac. 363; Deeney v. Milling Co. (N. M.) 67 Pac. 724; Lindl. Mines, § 381; Barringer & A. Mines & M. p. 253.

The judgment is reversed, and cause remanded for a new trial.

BEALS v. CONE et al.

1900. Supreme Court of Colorado. 27 Colo. 473, 62 Pac. 948.

Action by appellant, as plaintiff in the court below, as the owner of the Tecumseh lode, in support of his adverse against the application of appellees, as defendants, for patent to that portion of the Ophir lode in conflict with the Tecumseh. From a judgment in favor of defendants, plaintiff appeals. *Affirmed.*

Gabbert, J.[24a]— * * *

The southwest corner post of the Tecumseh was not placed where it fell by right, because it was claimed that point was impracticable. The evidence establishes that this corner fell upon a railroad embankment. It is claimed by counsel for appellant that the court instructed the jury to the effect that unless it was found from the evidence that the true southwest corner of the Tecumseh fell upon precipitous ground, and within the rails of the railroad occupying such embankment, or so near to one or the other of them that the erection of a post at that point would be interfered with by the passage of trains, it was the duty of appellant to set his post at the true corner. The instruction referred to is not happily worded, but it must be read as a whole, and also in connection with the one immediately following, from which it is apparent that the court directed the jury that appellant was required to place the southwest corner post of the Tecumseh lode at its true point, unless the evidence established that such point fell where it was impracticable to maintain it. Aside from these considerations, appellant is not in a position to complain of this instruction. It does not appear that the erection of a stake at the true corner would have been interfered with by the passage of trains. The most that can be said is that the true corner fell upon a railroad embankment 12 to 15 feet in height. The statute provides that when one or more of the posts which must be erected for the purpose of marking the surface boundaries of a mining claim "fall by right upon precipitous ground, where the proper placing of it is impracticable, or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked, to designate the proper place." Section 3153, 2 Mills' Ann. St. These provisions concerning the placing of witness stakes cannot be invoked when the setting of a stake at the true corner is merely difficult or inconvenient. Crœsus Mining, Milling & Smelting Co. v. Colorado Land & Mineral Co. (C. C.) 19 Fed. 78; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505. It certainly was not dangerous to life or limb to set this post at its true point upon a railroad embankment, and it does not appear that to have done so was impracticable; so that, if the instruction was susceptible of the construction

[24a] Parts of the opinion are omitted. For some of such parts see ante p. 143 and post p. 389.

claimed, it was correct, in that the post should have been erected at its true point, unless that point was in such proximity to the rails that it would be interfered with by the passage of trains. In this connection, we notice another point, although we do not wish to be understood as definitely deciding it. The statute above quoted provides that, where the conditions exist which authorize the placing of a boundary post at a place other than where by right it belongs, it shall be "suitably marked to designate the proper place." This requirement is for the purpose of designating where the true point or corner is, which is evidenced by such post, and that it shall be so marked as to impart this information. In this case it appears that the only marks upon the southwest corner post of the Tecumseh were "W. C.————9005." These marks certainly did not indicate, by either course or distance, where the true southwest corner of the claim would be found. * * *

The judgment of the district court is affirmed. Affirmed.

BROCKBANK v. ALBION MIN. CO.

1905. SUPREME COURT OF UTAH. 29 Utah 439, 82 Pac. 473.

Action by Joseph P. Brockbank against the Albion Mining Company. From a judgment for defendant, plaintiff appeals. Reversed.

BARTCH, C. J.—This is an action to determine the adverse claim of the parties to the right of possession of certain mining ground situate in Little Cottonwood Mining District, Salt Lake county, Utah. The plaintiff claims to be the owner and entitled to the possession of the Homestake No. 1 mining claim, which was located January 1, 1900. The defendant claims to be the owner and entitled to the possession of the Omega mining claim, located October 22, 1902, the Alice and Alice No. 1, both located January 2, 1903, and the Albion No. 8, located June 30, 1903. The area included within the boundaries of the four claims of the defendant includes all of the ground embraced within the boundary lines of the Homestake No. 1, and upon the defendant, on March 10, 1904, filing an application for a patent for its claims in the United States Land Office of this district, the plaintiff, within the time required by law, filed the adverse claim upon which this suit has been based. At the trial the court found and decided that the ground in dispute, subject to the paramount title of the United States, belonged to the defendant, and dismissed the plaintiff's complaint.

The appellant, among other things, contends that the court erred in finding that neither at the time of making the location nor at any other time since were the boundaries of the Homestake No. 1 marked by posts or monuments so as to indicate the boundaries of the claim. We think this point is well taken. Such a finding does

not appear to be warranted by the evidence. While the boundaries were not fully marked on the day the location notice was posted, because, the snow then being from 10 to 15 feet deep, it was impracticable to do so, still, the notice having contained a full description of the claim by courses and distances from the discovery monument, where it was posted, and the claim being a relocation of one covering the same ground, the corners of which were yet substantially in place, the location was at least sufficient to entitle the locator to perfect it within a reasonable time, or before other parties had acquired rights in the ground. When afterwards, before any rights of the defendant or adverse rights intervened, the plaintiff had the old monuments repaired, and the boundaries marked, with a post 3 inches thick and about 4 feet high, set in a stone monument at each corner, the location became complete, and subsequent locators were bound to take notice of the plaintiff's rights. Corner monuments having formerly been placed on the ground, and their locations corresponding with the calls in the notice, the locator, under the circumstances, had a right to adopt those monuments by repairing or reconstructing them, as was necessary, and the notice of location could properly be made to refer to the boundary monuments or stakes of the previous location. 1 Lindley on Mines, § 408; Conway v. Hart, 129 Cal. 480, 62 Pac. 44. And where a discovery of mineral has been made, and a proper location notice filed, then, if the boundaries are marked on the ground, before intervening rights have accrued, the claim will be valid. The locator, however, delays at his peril, since thereby he assumes the risk of intervening rights of third parties. 1 Lindley on Mines, §§ 330, 339; 1 Snyder on Mines, § 393; Erwin v. Perego, 93 Fed. 608, 35 C. C. A. 482; Jupiter Min. Co. v. Bodie Con. Min. Co. (C. C.) 11 Fed. 666; C. P. Gold-Min. Co. v. Crismon (Or.) 65 Pac. 87; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 6 Sawy. 299, 1 Fed. 522; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652; Warnock v. De Witt, 11 Utah, 324, 40 Pac. 205. We are of the opinion that at the time the mining claims of the defendant were located the Homestake No. 1 claim was sufficiently marked on the ground, and was then a valid claim, and that the court erred in its findings to the contrary.

We are also of the opinion that, under the evidence as it now appears in the record, the court erred in finding that the annnual assessment work was not performed on the Homestake No. 1 claim for the years 1901 and 1902, but, as the case must be reversed and remanded for a new trial, we do not deem it advisable to discuss any question relating to the findings on the subject of assessment work, since other and different evidence may be introduced at the next trial.

The judgment is reversed, and the cause remanded, with directions to the court below to grant a new trial; the costs to abide the final result.

BERGQUIST v. WEST VIRGINIA-WYOMING COPPER CO.

(See post, p. 240, for a report of the case.)

WEST GRANITE MOUNTAIN MIN. CO. v. GRANITE MOUNTAIN MIN. CO.

1888. Supreme Court of Montana. 7 Mont. 356, 17 Pac. 547.

McLeary, J.—This action was brought in the district court, to determine the right to a small piece of mining ground, which, by the plaintiff, is called the "Fraction," and by the defendant, the "Harrison" mining claim. There was a jury trial in the court below, and upon the general verdict and the special findings the court rendered judgment in favor of the plaintiff, from which the defendant appeals to this court. The only exception presented in the record and briefs of counsel is to the action of the court in denying the motion of the defendant to strike out all evidence on the part of the plaintiff in regard to the location of the "Fraction" lode, on the ground that the evidence showed no valid location. The appellant claims that the plaintiff never acquired any right to the "Fraction" lode claim, because the boundaries of said claim were not marked on the ground contained therein, so that they could be readily traced. The record shows that whatever marking of the boundaries of the "Fraction" lode claim was done, was by stakes set for corners on adjoining claims, the "Rattlesnake," "James G. Blaine," "Granite Mountain Extension," and the "Sunnyside," and not on the claim itself.

The matter is, then, narrowed down to this: whether or not such a marking of the boundaries as this complies with the act of congress. Section 2324, Rev. St. U. S., says: "A location must be distinctly marked on the ground, so that its boundaries can be readily traced." All that the statute requires, in our opinion, is that the land should be so marked upon the ground that the boundaries can be readily traced. This does not mean that the marks shall be upon the actual ground included within the mining claim, but they may be upon any ground adjoining, near enough to readily designate the boundaries. It was certainly never intended that a slight mistake in the setting of stakes should invalidate a location. All that was intended is that a person seeking to make a subsequent location could go upon the ground referred to, and from the marks made find the boundaries of the claim. *Gleeson* v. *Mining Co.*, 13 Nev. 462, 463; *Anderson* v. *Black*, 70 Cal. 230, 11 Pac. Rep. 700; *Taylor* v. *Middleton*, 67 Cal. 657, 8 Pac. Rep. 594; *Mining Co.* v. *Mining Co.*, 9 Min. R. 538, 539. There was an entirely parallel case decided by the Supreme Court of California on the 30th of June, 1887. The learned justice delivering the opinion in that case says: "It seems to be admitted that the location would have been a good one if all the ground covered by it had been vacant, as then it would have been so marked out that its boun-

daries could be readily traced. But it is insisted that when Stoughton placed his monuments upon adjoining claims, which were held under valid locations, he was a trespasser, and could acquire no rights by such trespassing; that his acts were void, and he could claim nothing by reason of the monuments so placed; that the parcel of land in controversy was not so marked on the ground that its boundaries could be readily traced, and therefore his attempted location was wholly invalid. If this be so, then it must follow that if the locator of a mining claim should happen, through mistake or otherwise, to place some of the monuments necessary to mark out his boundaries upon another's claim, though they might be over the line only a yard or a rod, still his location must wholly fail. We do not think this is or ought to be the law. It is familiar history in mining districts that claims have often been found to overlap one another to a greater or less extent. In such cases the question as to the ground covered by two locations has been: Which location was prior in time and superior in right? And it has never been held, so far as we know, that either of them must wholly fail because of the conflict. On the contrary, in so far as the ground taken was vacant, each location, if properly made in other respects, has been considered to be valid and sufficient." *Doe* v. *Tyley*, 14 Pac. Rep. 376.

The case which would seem most nearly to support the position of the appellant is one decided by this court in 1882. In that case the boundaries, as marked upon the ground, made the claim 2,000 feet in length; and Mr. Chief Justice WADE, in delivering the opinion of the court, says: "Before there can be a valid location there must be a discovery. Taking the discovery as the initial point, the boundaries must be so definite and certain as that they can be readily traced; and they must be within the limits authorized by law, otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of location would not impart notice, and would be equivalent to no boundaries at all. A discovery entitles the person making the same to a mining claim embracing the discovery, not to exceed one thousand five hundred feet in length by six hundred feet in width. Within these limits, if the boundaries are properly marked on the ground, and the location properly made and recorded, the grant of the government attaches, and third persons must take notice. But they would not be required to look for stakes or boundaries outside of or beyond the utmost limits of location as authorized by the statute." *Hauswirth* v. *Butcher*, 4 Mont. 307, 308, 1 Pac. Rep. 714. But in that case the stakes were set beyond the limits fixed by the statute. In this case they were set within the statutory limits, but on adjoining claims. The claim located is a small fraction,—300 feet long and 600 feet wide, surrounded by other locations,—and it appears that "the

location was marked on the ground, so that the boundaries can be readily traced." This is all that is required. There is no error apparent from the record, and the judgment is affirmed.

McKINLEY CREEK MINING COMPANY et al. v. ALASKA UNITED MINING COMPANY et al.

1902. SUPREME COURT OF THE UNITED STATES.
183 U. S. 563, 22 Sup. Ct. 84.

APPEAL from a judgment entered on a verdict for the plaintiffs in an equity case to establish title to placer mining claims. *Affirmed.*

Mr. Justice McKENNA delivered the opinion of the court.[25] * * *

On the part of the plaintiffs (appellees) the evidence tended to show that Dan. Sutherland, James Hanson, William Chisholm, and Jack Dalton, who compose the appellee company, and Peter Hall, and one Hawes, and C. P. Cahoon, were working at Pleasant camp in Alaska for William Chisholm on and prior to October, 1898. Prospecting on the river Porcupine was resolved on to be done by Hanson, Sutherland, and Cahoon, and the following power of attorney was given to Cahoon:

> Know all men by these presents that Peter Hall, William Chisholm, William S. Hawes, of Pleasant Camp, British Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, C. P. Cahoon, of Pleasant Camp, British Columbia, our true and lawful attorney, for us and in our names, place, and stead, to locate a mining claim in the territory of Alaska.
>
> In testimony whereof we have hereunto set our hands and seal this 4th day of Oct., A. D. 1898.
>
> Peter Hall. [SEAL.]
> Wm. A. Chisholm. [SEAL.]
> Wm. S. Hawes. [SEAL.]
>
> Signed, sealed and delivered in the presence of—
> Dan Sutherland.
> J. Hanson.

Provisions were furnished the party, and they started out on the 4th of October, 1898, and met on the creek (subsequently given the name of McKinley) certain members of the appellant company. Gold was discovered, and Cahoon wrote notices of location for Chisholm and Hall upon a snag or stump in the creek, making their claims contiguous, and afterward reported that he had done so, saying that he had staked Chisholm first and Hall next. Chisholm and Hall went to the claims about the 20th of October, and cut trails to them, and did other work upon them; and at that time copied

[25] The statement of facts and parts of the opinion are omitted.

the notices of location and had them recorded. The notices, with their indorsements, were introduced in evidence.

The testimony was given by several witnesses and in great detail, and it was opposed at about all points by testimony of several witnesses, including Cahoon; and as to who first discovered gold there was a decided conflict whether Sutherland did, who is one of the appellee company, or whether Hackley did, under a location by whom the appellant company claims. Also a conflict as to whether Hackley protested when Cahoon wrote the notices of location for Chisholm and Hall, and whether Cahoon promised to take them down and authorized Hackley to do so, and, upon his declining, authorized Lewis, one of the appellant company, to take them down and relocate Chisholm and Hall further up the creek, and whether Lewis did so.

1. It will be observed that the main controversy of fact between the parties was as to who made the first discovery of gold,—Hackley or Sutherland. On this testimony appellants base three contentions, to which, they claim, the instructions asked by them at the trial court were addressed: * * *

(2) That the locations relied on by appellees were invalid because they were not "distinctly marked on the ground, or otherwise designated as required by law."

(3) That the citizenship of Chisholm and Hall was put at issue by the pleadings, and no evidence was offered to establish it, but, on the contrary, the power of attorney under which Cahoon acted represents them to be citizens of British Columbia.

Without now questioning the soundness of either of these contentions, it is enough to say that the assignments of error based upon the refusal of instructions cannot be entertained. This is undoubtedly a suit in equity, and if it may be regarded as entertained under the general powers conferred by the act of May 17, 1884 (23 Stat. at L. 24, chap. 53), error cannot be predicated upon the giving or the refusing of instructions. The verdict was but advisory to the court, to be adopted or disregarded at the court's discretion. * * *

The second contention is that they are invalid because they were not "distinctly marked on the ground." The appellants base this contention on Cahoon's testimony. His testimony is that he wrote the notices of locations upon a stump or snag in the creek, and they were as follows: "I, the undersigned, claim 1,500 feet running down this creek and 300 feet on each side."

But the notices produced by other witnesses, and which were testified to be copies, as near as could be made out, of those on the stump, were respectively as follows:

Notice is hereby given that I, the undersigned, have, this 6th day of October, 1898, located a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley creek, in Porcupine mining district, running into Porcupine river. This claim is the east exten-

sion of W. A. Chisholm claim on about 1,800 feet from the first falls above the Porcupine river, in the district of Alaska. Peter Hall, Locator.
Witnesses: J. Hanson.
D. Sutherland.

Notice is hereby given that I, the undersigned, have, this 6th day of Oct., 1898, located a placer mining claim 1,500 feet along creek bottom and 300 feet from center of creek each way on creek known as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim and about 300 feet above first falls on said creek, in the district of Alaska. Wh. A. Chisholm, Locator.
Witnesses: D. Sutherland.
James Hanson.

These notices constituted a sufficient location; the creek was identified, and between it and the stump there was a definite relation which, combined with the measurements, enabled the boundaries of the claim to be readily traced. *Haws* v. *Victoria Copper Min. Co.*, 160 U. S. 303, 40 L. Ed. 436, 16 Sup. Ct. Rep. 282.

3. Conceding, appellants say, a proper discovery and a proper description of the location, nevertheless, as the citizenship of the locators was put in issue, it was necessary to be proved to justify a judgment for the appellees, because under § 2319, Rev. Stat., the public lands of the United States are only open to exploration, occupation, and purchase by citizens of the United States and those who have declared their intention to become such.

In *Manuel v. Wulff*, 152 U. S. 505, 38 L. Ed. 532, 14 Sup. Ct. Rep. 651, this court sustained the validity of a conveyance of a mining location to an alien, reversing a decision of the supreme court of Montana to the contrary. The decision was based upon the difference between a title by purchase and title by descent, and the doctrine expressed that an alien can take title by purchase, and can only be devested of it by office found. The case of *Doe ex dem. Goveneur* v. *Robertson*, 11 Wheat. 332, 6 L. Ed. 488, was cited and approved, and the remarks of Mr. Justice Johnson in that case become apposite:

"That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. Hence it is usually said that it has regard to the solemnity of the livery of seisin, which ought not to be devested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which from its good sense and applicability to the nature of our government makes it proper to introduce it here. I copy it from Bacon, not having had the leisure to examine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural-born subject that is resident in the Kingdom and that owes a local allegiance to the King, till the

contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold."

That grantees of the public land take by purchase this court, in *Manuel* v. *Wulff,* left no doubt. It was said that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. *Forbes* v. *Gracey,* 94 U. S. 762, 24 L. ed. 313; *Belk* v. *Meagher,* 104 U. S. 279, 26 L. ed. 735; *Gwillim* v. *Donnellan,* 115 U. S. 45, 29 L. Ed. 348, 5 Sup. Ct. Rep. 1110; *Noyes* v. *Mantle,* 127 U. S. 348, 32 L. Ed. 168, 8 Sup. Ct. Rep. 1132.

The appellants, however, deny the application of *Manuel* v. *Wulff,* and contend that this suit having been brought under § 500 of the Oregon Code, in order to maintain the suit, the appellees must show a right to the exclusive possession of the ground in dispute. This is in effect to say that, while the validity of the location may not be disputed by applicants that the right to the possesion, which is but an incident of the location, may be. We do not concur in this view. The meaning of *Manuel* v. *Wulff* is that the location by an alien and all of the rights following from such location are voidable, not void, and are free from attack by anyone except the government.

It is not necessary to notice other points made by appellants; and, discovering no error in the record, *judgment is affirmed.*

KERN OIL CO. v. CRAWFORD.

1903. Supreme Court of California. 143 Cal. 298, 76 Pac. 1111.

Action by the Kern Oil Company against Mrs. J. M. Crawford. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Van Dyke, J.[26]—When this case was in department the following opinion was rendered: "* * * On the 29th day of May, 1899, the grantors of plaintiff, who were citizens of the United States, and duly qualified under the laws thereof to enter and locate mineral lands, entered upon the northeast quarter of section 32, township 28, south range 28, east M. D. M., with intent to locate the same as a placer mining claim. They posted a notice upon the said land, claiming the quarter section as placer mining ground, and naming it the 'Dewey No. 4 Placer Mining Claim,' claiming it for petroleum, asphaltum, gypsum, and all other forms and deposits contained in and under said quarter section. The notice was dated,

[26] Parts of the opinion are omitted.

complied with the law, and was recorded with the county recorder of Kern county on June 1, 1899. The locators, after posting and recording said notice, caused a survey to be made in order to mark the boundaries of their claim to the quarter section. Stakes were set at the northeast, southeast, northwest, and southwest corners thereof. These stakes were 4x4 redwood posts, painted white, and marked, the one at the northeast corner, 'N. E. corner section 32,' and the one at the southeast corner, 'S. E. corner section 32.' On a line between said two last-named stakes the locators caused to be set several laths to mark the line, which was believed to be the east line of the quarter section and the east line of the claim. The boundary on the east as so marked on the ground could be readily traced. The said northeast quarter is and was public mineral land, and the locators discovered petroleum and placer mineral within the boundaries thereof. The said stake marked 'N. E. corner section 32' was and is 73 feet west of the true northwest corner of the northwest quarter of section 33, and the stake marked 'S. E. corner section 32' was and is 24 feet west of the southwest corner of the northwest quarter of section 33. There was thus a strip of land east of the line marked by the locators as the east line of the quarter section, running north and south the entire length of the quarter section, and west of the true east line of the quarter section, said strip being 73 feet wide at the north end thereof and 24 feet wide at the south end thereof. This strip is the land in controversy.

"The defendant was and is duly qualified to enter mining claims, and is a citizen of the United States. On the 3d day of March, 1900, she entered upon said strip of land, caused it to be surveyed, and stakes set at the corners thereof for the purpose of marking its boundaries. She duly posted a notice of her location, describing the strip of land, and naming her claim 'Mountain View Placer Mining Claim.' She discovered petroleum oil and placer mineral on the said claim so located by her, and recorded her notice in the county recorder's office of Kern county.

"The main question presented for determination is whether, conceding that the law requires the boundaries of placer claims on surveyed lands to be marked, the original locators sufficiently marked their claims. Defendant is presumed to have had notice of the location made by plaintiff's grantors and the markings on the stakes. The stake painted white, and marked 'N. E. corner section 32,' was not without meaning to defendant and her surveyor. And so of the stake marked 'S. E. corner section 32.' Particularly is this so when the notice claimed the quarter section. It was only by having a survey made that defendant discovered that the stakes set by the original locators were west of the true line. While these stakes, if standing alone with no marks upon them, would indicate to defendant that they were intended to mark the easterly boundary of

the claim, yet the very stakes themselves told her that the claim was intended to embrace the quarter section to the east line thereof. And the notice told her the same thing. It was not reasonable for her to believe that the original locators did not intend to include the strip of land in their location. The United States had surveyed and marked the quarter section by monuments, and an unintentional mistake in retracing the lines should not be held to be a waiver by the locators of the claim to the whole quarter section. * * * The object of the statute as to marking the location, so that its boundaries can be readily traced, is to notify the public that the claim has been located and is claimed under the mining laws of the United States. Whatever is sufficient to give this notice does give it. Technical accuracy, either in the location of the stakes or in the wording of the notice, is not required. If a third party, intending to locate, can readily ascertain from what has been done by the prior locator the extent and boundaries of the claim so located, then the object of the statute has been accomplished. In this case the defendant had ample notice of the location of the quarter section by plaintiff's grantors; she knew what they intended to take. If they made a mistake as to the location as to the west line, it did not in any way injure defendant. She will not be allowed to take advantage of a mistake which in no way injured her. She knew she was attempting to locate land claimed by the original locator. It appears that defendant found the lines. She thought that the locators had not found them, and, although she was told by the notice that the quarter section had been located and entered, she acted upon her peril in regarding a portion of it as vacant."

The department opinion is adopted, and in addition to what is there said, and in answer to the petition for rehearing, we will discuss other points. * * *

And, as the point is urged by appellant that it is not necessary to mark the boundaries of a placer claim upon the ground, where the location is of a legal subdivision upon surveyed lands, we will discuss the question.

The Revised Statutes of the United States (section 2319 et seq.) provide as to the location of vein or lode claims. Section 2324 provides: "The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." After the provisions fully covering vein or lode claims, section 2329 provides: "Claims usually called 'placers' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar pro-

ceedings as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands." Section 2330 provides that legal subdivisions of 40 acres may be subdivided into 10-acre tracts, and that joint entries may be made by two or more persons, but that no location "shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys." Section 2331 provides: "Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer claims located after the 10th day of May, 1872, shall conform as near as practicable with the United States system of public surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant."[27] Section 2334 provides for the survey of mining claims, and "the expenses of the survey of vein or lode claims, and the surveys and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants." It is thus seen that the system contemplates that a sale of placer claims will ordinarily be made by legal subdivisions. When a location is made according to legal subdivisions, no provi-

[27] In Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55, 56, Angellotti, J., for the court said: "It is contended by defendants that no valid location was effected by the Kentucky claimants, for the reason that their claim was upon surveyed government land, and did not conform to legal subdivisions. The findings show that the location was made upon surveyed government land, and that the description thereof by metes and bounds consisted of nine courses, of which only five conformed to the lines of the United States system of public land surveys. This fact would not of itself, however, render the location invalid, for it is well settled that, under sections 2329, 2330, and 2331 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1432], placer claims are required to conform to the lines of the public survey only where such conformity is reasonably practicable, and that, where such conformity is not reasonably practicable, it is sufficient if they conform to such lines as near as is reasonably practicable. In was held by Secretary of the Interior Teller in Re Rablin, 2 Land Dec. Dep. Int. 764, that it was the intention of Congress to provide for cases where the situation of the deposits is such that conformity of the location with subdivision lines is unreasonable, and to permit persons to take a certain quantity of land fit for mining, and not to compel them to take such a quantity irrespective of its fitness for mining, and that it was not practicable to conform to the lines of the survey in a case where the entire placer deposit in a cañon within certain limits is claimed, and where the land on either side is entirely unfit for mining or agriculture. See, also, Esperance M. Co., 10 Copp's Land. Dec. 338; In re Pearsall & Freeman, 6 Land. Dec. Dep. Int. 227; Lindley on Mines, § 448. We have not been referred to any decision or ruling disapproving the views expressed in the above authorities. The case of Miller Placer Claim, 30 Land Dec. Dep. Int. 225, 351, was not, as we read it, intended to make any change in the rule laid down in the prior decisions. In view of this well-established rule, the findings of the trial court entirely dispose of defendants' contention in this behalf."

sion is made for surveying it again, for the evident reason that it is sold as per the survey that has already been made by the United States. The statute expressly provides that in such a case no further survey or plat shall be required. The purchaser takes it to the extent of its exterior boundaries as already established by the United States. His notice of location is a notice of its boundaries, precisely as it would be in case of a homestead or pre-emption claim. There is no reason why the locator should be required to stake it out and mark its boundaries, nor does the statute require it. They have already been staked out and marked, and cannot be changed. Any person seeing the notice could by employing a surveyor or otherwise, find the boundaries as easily as could the locator, and it evidently is the duty of such person to do so, in case he is interested in knowing where they are. The notice in this case stated to the world that the northeast quarter of section 32 had been located as a placer claim. The notice did not have to further state the boundaries of the quarter section, nor did the locator have to place stakes or marks upon the ground to show to any one the lines of the quarter section. He was no more required to do this than he was to take defendant around and show her the lines. As stated in the department opinion: "It appears that defendant found the lines. She thought that the locators had not found them, and, although she was told by the notice that the quarter section had been located and entered, she acted upon her peril in regarding a portion of it as vacant." The government survey of public lands is made by running and marking the lines of the townships and sections, and by marking the corners of the townships, sections, and quarter sections, and a conveyance by reference to the legal subdivision refers, as a matter of law, to the monuments placed on the ground by the United States. Powers v. Jackson, 50 Cal. 429; Bullock v. Rouse, 81 Cal. 591, 22 Pac. 919. The construction herein placed upon the statutes as to placer claims is supported by the opinion of the assistant secretary of the Interior Department in an opinion dated March, 1896. Reins v. Murray, 22 Land Dec. Dept. Int. 409. He said, in speaking of placer locations: "It does not, in my judgment, mean that when the placer is located on surveyed lands it is necessary to mark the boundaries. There is no purpose that can be subserved by so doing. The public surveys are as permanent and fixed as anything can be in that line, and any fractional part of a section can be readily found and its boundaries ascertained by that method for all time to come, and is necessarily more stable and enduring than marking it by perishable or destructible stakes or monuments."

In Temescal Oil Co., etc., v. Salcido, 137 Cal. 212, 69 Pac. 1010, it was held that the location of a placer claim was properly marked on the ground, and in the opinion it is said: "We are influenced somewhat in our consideration of the point by the fact that the

notice of location which was posted and recorded described the claim by its government subdivision, the land having been already surveyed by the government, and that a government monument was still in place at one corner of the claim at the time of the location."

The case of White v. Lee, 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115, is in conflict with what has here been said, and is overruled. That case, in our opinion, does not correctly interpret the statutes. It proceeds upon the theory that the "boundaries shall be distinctly marked on the ground." The requirements of section 2324 are not that the boundaries shall be distinctly marked on the ground, but "the location shall be distinctly marked on the ground so that its boundaries can be readily traced." The location here was distinctly marked on the ground, and its boundaries can be readily traced by any one who will follow the "exterior limits" of the quarter section. White v. Lee has never been followed by this court, except perhaps in Anthony v. Jillson, 83 Cal. 298, 23 Pac. 419, where the point was not necessary to the decision in the latter case, and was dictum. We more readily reach this conclusion for the reason that our decision in the case at bar will not impair or invalidate any location made in conformity with White v. Lee. If the location and entry of any one has been made in conformity with the ruling in White v. Lee, it is valid under the ruling in this case, although more may have been done than was necessary.

The judgment and order are reversed, and the court below directed to cause judgment to be entered on the findings in favor of plaintiff.[28]

WORTHEN et al. v. SIDWAY et al.

1904. Supreme Court of Arkansas. 72 Ark. 657, 79 S. W. 777.

Action by W. B. Worthen and others against H. T. Sidway and others to determine the ownership of certain mining claims. From a judgment adjusting the claims, complainants Worthen and others appeal. Affirmed in part, and reversed in part.

Battle, J.[29]—* * * On the 6th day of July, 1889, M. C. Cantrell, T. R. Cantrell, J. B. Moss and W. A. Bradley, whom, for convenience, we shall hereafter call "Cantrell and others," attempted to locate a placer mining claim upon the west half of the northeast quarter of said section 31, [upon which Worthen and others had

[28] By the California Mining Statute of 1909 it is provided that a placer claim taken by legal subdivisions on land covered by the United States survey need not be staked or monumented. Statutes Cal. 1909, p. 314, § 1426c.

[29] Parts of the opinion are omitted.

placer claims] and posted on a tree on the land the following notice:

"Notice is hereby given that the undersigned claimant, under the revised statutes of the United States, section 2331, chapter 6, title 32, act of May 10, 1872, and legislation supplemental thereto, and the local laws of Newton County Mining District of Arkansas, has this day located and by possessory right claims the exclusive right to hold, prospect and mine upon the following described land lying in the county of Newton and State of Arkansas, to-wit: west half, northeast quarter of section 31, township 10 north, range 21 west, including all leads, lodes, dips, spurs and angles, with a view to obtaining a patent to the same.

"The name of this claim is the Independence, Lot No. ——. All persons are notified not to trespass on the same.

"Located this 6th day of July, 1899.

"M. C. Cantrell. T. R. Cantrell.
"J. B. Moss. W. A. Bradley.

"Witnesses:
"A. J. Hudson, Jesse Hickman."

Further than this they traced no boundary lines; and performed only $20 worth of work on their claim. * * *

Cantrell and others attempted to prove in this suit that Worthen and others had failed to do upon their claims the annual work required by the statute, and had not thereafter resumed work in good faith before they located their claims. But it was shown that they did considerable work before that time, and thereafter, in the year 1899, performed $500 worth of labor upon their claims, and $500 or $600 worth of work in the year 1900. * * *

The validity of the location of the mining claims by the grantors of Worthen and others is not denied or questioned. We shall therefore treat them as valid.

Was the location of a [placer] mining claim by Cantrell and others valid?

They attempted to make a location by posting a notice on a tree, in which they claimed the exclusive right to hold, prospect, and mine upon the west half of the northeast quarter of section 31, township 10 north, range 21 west. No effort was made to distinctly mark the location on the ground so that its boundaries can be readily traced. The notice did not contain "such description of the claim or claims located by reference to some natural or permanent monument as will identify the claim."

Was their claim located sufficiently to entitle them to hold the same?

Section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426] provides: "The miners of each district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject

to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter shall contain the name or names of the locators, the date of the location, and such description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

And section 2329 of the same statutes [U. S. Comp. St. 1901, p. 1432] is as follows: "Claims usually called 'placers,' including all forms of deposits excepting veins of quartz, or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided by law for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

It has generally been held by courts that these statutes are mandatory, and that in the location of mining claims their requirements must be strictly complied with (North Noonday Mining Co. v. Orient Mining Co., 6 Sawy. 299, 11 Fed. 125; Doe's Ex'rs v. Waterloo Mining Co., 44 U. S. App. 204, 70 Fed. 455, 17 C. C. A. 190; Erwin v. Perego, 93 Fed. 608, 35 C. C. A. 482; 20 A. & E. Encyclopedia of Law [2d Ed.] 713 and cases cited); and that they apply with equal force to placer and lode claims (section 2329, Rev. St. U. S.; McCann v. McMillan, 129 Cal. 350, 62 Pac. 31; Sweet v. Webber, 7 Colo. 443, 4 Pac. 752; McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616; North Noonday Mining Co. v. Orient Mining Co., 6 Sawy. 299, 11 Fed. 125; 20 A. & E. Ency. of Law [2d Ed.] 714, and cases cited).

In order to acquire a mining claim of any description, its "location must be distinctly marked on the ground, so that its boundaries can be readily traced." The marking on the ground may be any physical marks placed or natural object already there, which of themselves, or in connection with writings, signs, or other things upon the ground, will tend to inform one seeking to identify the claim as to the quantity and identity of the land claimed. North Noonday Mining Co. v. Orient Mining Co., 6 Sawy. 299, 11 Fed. 125; Conway v. Hart, 129 Cal. 480, 62 Pac. 44; Golden Fleece Gold, etc., Mining Co. v. Cable Consol. Gold, etc., Mining Co., 12 Nev. 312; Gleeson v. Martin White Mining Co., 13 Nev. 442. Such physical marks or natural objects may be stakes driven in the ground, stone monuments, blazed trees, confluences of streams, mining shafts, mountains peaks, crossing of roads, and streams. Hammer v. Goldfield Mining Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; Bennett v. Harkrader, 158 U. S. 442, 15 Sup. Ct. 863, 39 L. Ed. 1046; 20 A. & E. Ency. of Law [2nd Ed.] 719, and cases cited.

McKinley Creek Mining Co. v. Alaska U. S. Mining Co., 183

U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331, is a good illustration of what is a sufficient marking on the ground. In that case one Cahoon found gold in a creek, and located a claim by posting notices upon a stump in the creek, one of which is as follows: "Notice is hereby given that I, the undersigned, have this 6th day of October, 1898, located a placer mining claim, 1,500 feet running with the creek, and 300 feet on each side from the center of the creek, known as McKinley creek, in Porcupine river. This claim is the extension of W. A. Chisholm claim on about 1,800 feet from falls above Porcupine river, in the district of Alaska."

The court said: "These notices constituted a sufficient location. The creek was identified, and between it and the stump there was a definite relation which combined with the measurement enabled the boundaries of the claim to be readily traced," cited Haws v. Victoria M. Co., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436.

It is, however, contended that the requirement as to location of a placer claim by marks on the ground, so that its boundaries may be readily traced, does not apply where the land has been surveyed, and the claim is for the whole of a legal subdivision. * * *

So much of section 2331 as provides that, where the lands have been previously surveyed by the United States, all placer mining claims located thereon shall conform to the legal subdivision of the public lands, is simply a direction as to where the claimant shall run the exterior lines of his claim. It is not inconsistent with the requirement to the statute as to how the lines shall be marked or evidenced; nor does it dispense with, or answer the purpose of, such requirement. The language of the statute is, "The location must be distinctly marked on the ground, so that its boundaries can be readily traced." The intention of this statute is that the boundaries shall be so designated by marks that they can be ascertained by an inspection of the ground without the aid of a surveyor, and can be readily traced by such marks. As said in White v. Lee, 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115: "The men for whose information the boundaries are required to be marked wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run and ordinarily it would do them no good to be informed that a quarter section of a particular number had been taken up. They would derive no more information from it than they would from a description by metes and bounds, such as would be sufficient in a deed. For the information of these men it is required that the boundaries shall be 'distinctly marked upon the ground.' The section lines may not have been 'distinctly' marked upon the ground, or the marks may have become obliterated by time or accident. And to say that the mere reference to the legal subdivision is of itself sufficient would, in our opinion, defeat the purpose of the requirement." Anthony

v. Jillson, 83 Cal. 296, 23 Pac. 419; 1 Lindley on Mines (2nd Ed.) § 454, and cases cited; Barringer & Adams on Mines and Mining, 477.

It follows, then, that the location of Cantrell and others was invalid, and that they acquired no rights thereby. * * *

W. T. Sidway abandoned his interest in the claims held by Worthen and others. He entered into a contract with Lombard, Garvin and Andrews, and set up a mining claim which was inconsistent with and in opposition to the claim of Worthen and others, and thereafter failed and refused to assist in any way in holding and maintaining the latter claims, and when requested to do so said, "We are therefore out of the fight," evidently meaning he had no interest in the claims of Worthen and others, and had abandoned the same, as shown by his subsequent acts.

When Sidway abandoned his interest, it did not revert to the government. The law does not recognize the acquisition from the government of fractional parts of mining claims. Each claim must be located and acquired as a whole. The assessment work required to be done is entire. One of the owners cannot do his part and thereby save his part. The result is, if one co-tenant abandons his interest, it passes out, and the other co-tenants acquire the entire claim by compliance with the statutes. * * *

So much of the decree in this case as is according to this opinion is affirmed. The remainder is reversed, and the cause is remanded, with instructions to the court to enter a decree in accordance with this opinion.

McDONALD et al. v. MONTANA WOOD CO.

1894. SUPREME COURT OF MONTANA. 14 Mont. 88, 35 Pac. 668.

ACTION by John McDonald and others against the Montana Wood Company for damages for trespass in cutting down and converting timber on plaintiff's placer mining claim. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Modified.

PEMBERTON, C. J.[30]—On the 23rd day of September, 1890, plaintiffs (being seven in number) and Thomas Joyes located the Landlock placer mining claim, a tract of ground in Jefferson county, which they estimated at the time contained 160 acres, but which afterwards, by a survey, was found to contain about 76 acres. Plaintiffs made but one discovery on the entire tract. They marked the boundaries by blazing a tree at each corner of the entire tract of ground, and designated each of said corners of the claim by writing

[30] Part of the opinion is omitted.

with a pencil, on the respective blazed trees, the name of the claim, and the corner each tree represented. They also marked a tree at the discovery shaft, and posted a notice on the claim. The notice contained the names of all the locators, and a description of the ground claimed. The tract of land so located was not in any way subdivided into 20-acre claims, and no other discoveries were made, or marking done on the ground, than as stated above. During the year 1891 plaintiffs did work and made improvements on the entire tract of land to the amount of about $150. The complaint, which was filed November 21, 1891, charged that in the month of December, 1890, and at divers times between that date and the commencement of this suit, the defendant knowingly, willfully, and maliciously entered upon said land without the consent of plaintiffs, and cut down and carried away a large amount of trees and timber growing thereon, etc., claiming actual damages in the sum of $3,000, and asking judgment for treble damages under section 363, Code Civ. Proc. The answer denies the title of plaintiffs, and all the material allegations of the complaint. The case was tried by the court with a jury. The jury returned a verdict for plaintiff in the sum of $549.63, as actual damages, which they trebled, making the sum of $1,648.49, for which sum judgment was rendered. Defendant moved for new trial. This motion was overruled. The defendant appealed from the judgment, and the order refusing a new trial.

The appellant contends that the location of the mining claim in the manner as above described is a nullity, and conferred upon plaintiffs no right or title to the Landlock placer mining claim, or to the right of possession thereof. The appellant claims that, under the law, the plaintiffs should have made a discovery on each 20-acre tract contained in the land sought to be located;[31] that each 20-acre tract therein contained should have been marked upon the surface thereof, so that the boundaries thereof could have been readily traced; that a separate location of each 20-acre tract was necessary under the law; and that work or improvements of the value of $100 should have been done on each 20-acre tract contained therein, for the year 1891. Section 2330, Rev. St. U. S., among other things, provides: "But no location of a placer claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons." This statute, it seems to us, confers the right upon an association of not less than eight persons to locate not to exceed 160 acres in one claim. This has been the holding and ruling of the United States land department uniformly, as far as we have been able to discover; and patents have uniformly issued in such cases when there was a showing of an ex-

[31] "But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons." Land Office Mining Regulations, rule 19. See Hall v. McKinnon, 193 Fed. 572.

penditure of $500 in work or improvements upon any part of the 160-acre claim. See Good Return Min. Co., 4 Dec. Dep. Int. p. 221; also, Moor. Min. Rights (7th Ed.), p. 134. In Smelting Co. v. Kemp, 104 U. S. 636, Mr. Justice Field, delivering the opinion of the court, says: "The last position of the court below—that the owner of contiguous locations, who seeks a patent, must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed—is as untenable as the rulings already considered;" and in the same case it is said: "It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations." In this case just cited, Mr. Justice Field is speaking of the things necessary to be done by an applicant to obtain a patent to placer mining ground. In no case, nor in any ruling or decision of the United States land department, that we have been able to find, is it held to be necessary that a separate discovery, separate marking of the boundaries, separate recording, and separate work should be made and performed upon each 20 acres contained in a 160-acre placer claim authorized to be located under one location by an association of persons. If the plaintiffs in this suit had made such a discovery on the ground in controversy, and had made such a location thereof, and were performing such work and making such improvements thereon as would entitle them to a patent therefor under the mining laws of the United States, then they had such title and right to possession as would entitle them to prosecute this action for damages for the trespass complained of.

The appellant further contends that the evidence shows that the plaintiffs had forfeited any right or title they may have had to the ground in controversy, by failing to do the required amount of work thereon for the year 1891. The evidence in this case shows that work of the value of about $150 was done for that year upon the entire claim. If, under the decisions of the land department and the tendency of the adjudications of the courts, $500 in work and improvements, on any part of a 160-acre claim, or any one of a number of contiguous claims, is sufficient to entitle applicants to a patent for the whole of such ground or claims, then, by parity of reason, it would seem that $100 in work or improvements expended or made upon such 160-acre claim in any one year would save it from forfeiture. Such seems to be the view taken by the land offices, and is in accordance with the customs, rules and regulations of miners in this jurisdiction. * * *

The evidence in the case does not support the contention that there was any willfulness, wantonness, or maliciousness in the acts or conduct of the defendant. We therefore think that the evidence did not justify the rendering of judgment for treble damages against the defendant in this case. It is ordered that judgment by the court below be modified by rendering judgment in favor of plaintiffs, against

the defendant, for the amount of actual damages found by the jury, and in other respects the judgment is affirmed as modified.

JONES ET AL. v. WILD GOOSE MINING & TRADING CO. ET AL.

1910. CIRCUIT COURT OF APPEALS. 101 C. C. A. 349, 177 Fed. 95.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Action by the Wild Goose Mining & Trading Company and Frank J. Kolash against Daniel A. Jones and Charles D. Jones. Judgment for plaintiffs, and defendants bring error. Affirmed.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge.[32]—This is an action in ejectment brought by defendants, in error, plaintiffs below, to recover possession of a certain piece of placer mining property in Alaska, and for damages.

There is no substantial conflict in the evidence as to the material facts: On the 1st day of January, 1901, Harry M. Ball located the Navajoe placer claim, which, by the notice of location, and the recorder's certificate, contained a tract of land 1,320 feet long and 660 feet wide, i. e., an area of just 20 acres; but, as actually marked upon the ground by the boundary stakes, there was by inadvertence and honest mistake embraced within the claim an excess amounting to slightly over 2½ acres, so that the claim really covered 22.531 acres, instead of the 20 acres allowed by law.

The Wild Goose Mining & Trading Company and Frank J. Kolash, defendants in error, succeeded to the title of the locator Ball prior to the commencement of this action. * * *

Upon measuring the boundary lines of the Navajoe [in the course of negotiations for a lease], plaintiff in error Daniel A. Jones, who is a civil engineer and surveyor, found that they were too long, and that consequently the claim was excessive in area, containing more than the legal 20 acres. He, therefore, directly proceeded to make an accurate survey, and having thereby determined that the Navajoe, as located on the ground, included 22.531 acres, he did on August 12th, without having given the defendants in error any notice of his discovery of the fact that the Navajoe was excessive in area, go to the Navajoe claim and select, locate, and stake a portion thereof as the "Papoose fraction," a triangular tract embracing 2.531 acres of the northeasterly portion of the Navajoe claim, which amount he

[32] Parts of the opinion are omitted.

had ascertained was the excess area included within the original Navajoe boundaries, and which particular piece of ground he preferred to any other in the Navajoe claim. Immediately upon locating the Papoose fraction, plaintiffs in error assumed possession thereof and went to work sinking a shaft, and prosecuted work thereon until during the latter part of September, 1908, when they made a discovery of a few colors of placer gold, and followed this up with a discovery of gold in paying quantities about October 1st.

There is a conflict of testimony among the witnesses as to the exact date when the Navajoe owners became apprised of the fact that their claim was excessive in area, and that the plaintiff in error had located and staked the Papoose fraction. It is admitted, however, that they had no knowledge, and that no notice thereof was given to the owners of the Navajoe by the plaintiffs in error, until after location and staking of the Papoose fraction.

On August 21 or 22, 1908, T. M. Gibson, a representative of the Wild Goose Mining & Trading Company, in a conversation with said Jones, asked the latter to pull up the stakes marking the Papoose fraction, for the reason that "the owners of the Navajoe did not want to cast off the excess, if any there was, just the way he had staked it, but if he would take up his stakes, they would cast off the excess where they thought it best to do so, and that then he could take it if he wanted to." Jones refused to comply with such request. Thereafter on November 7, 1908, defendants in error caused the Navajoe claim to be surveyed, and thereupon cast off 2.54 acres from the southeasterly portion of the claim, and made an amended location of the claim, of the remaining 20 acres. On November 12, 1908, one W. H. Lonagan, acting in behalf of the Wild Goose Mining & Trading Company, located and staked the excess so cast off as the "pump fraction."

At the close of the testimony, plaintiffs moved the court to direct the jury to bring in a verdict for plaintiffs. This request was granted, and the jury, pursuant to the court's instructions, found for the plaintiffs. Judgment was entered in accordance therewith, and defendants sued out this writ, assigning for errors the action of the court in sustaining plaintiff's motion, and instructing the jury to return a verdict in favor of the plaintiffs, and in entering judgment upon the verdict of the jury, and in overruling defendants' motion for a new trial.

The law under which mining locations may be made is to be found in chapter 6 of title 32, Rev. St. (U. S. Comp. St. 1901, pp. 1422–1442). By section 2322 it is provided that:

> "The location of all mining locations * * * on any mineral vein, lode or ledge, situated on the public domain, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations. * * *"

And by section 2329 it is provided that:

"Claims usually called 'placers' including all forms of deposits, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

In a late case, Clipper Mining Co. v. Eli Mining & Land Co., 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944, the Supreme Court, commenting on these sections, says:

"It will be seen that section 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. * * * That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. * * * In Belk v. Meagher, 104 U. S. 283 [26 L. Ed. 735], it was said by Chief Justice Waite that 'a mining claim perfected under the law is property in the highest sense of that term,' and in a later case (Gwillim v. Donnellan, 115 U. S. 45, 49 [5 Sup. Ct. 1110, 1112, 29 L. Ed. 348]), he adds: 'A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second.' In St. Louis Mining Co. v. Montana Mining Co., 171 U. S. 650, 655 [19 Sup. Ct. 61, 63 (43 L. Ed. 320)], the present Chief Justice declared that: 'Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. * * * And this exclusive right of possession and enjoyment continues during the entire life of the location.'"

Again, in Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, the Supreme Court has said:

"Mining claims are not open to location until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

These principles of law, long settled and unambiguous, are the ones that must be invoked for guidance in the determination of the single question presented for decision by the record in this case, and that is: The right, as between the parties to this action, to the pos-

session of the ground embraced within the so-called "Papoose fraction" location. It is evident, from the decisions of the Supreme Court above cited, that, if the location by Jones of the Papoose fraction was void and invalid, then no possessory rights were initiated and he acquired none.

In Waskey v. Hammer, 170 Fed. 31, 34, 95 C. C. A. 305, 308, this court said:

> "A location made in good faith and otherwise conformable to law is not rendered wholly void by reason of such excess; but that the excessive area only is void is well settled. And that such locator is at liberty to select the portion of the claim that he will reject as such excess is also established law."

And in Walton v. Wild Goose Mining & Trading Co., 123 Fed. 218, 60 C. C. A. 144, this court, through Judge Hawley, regarded an excess of 20 acres in the location of a placer claim as not invalidating the location, but merely rendering it voidable as to the excess. The same doctrines are announced in Zimmerman et al. v. Funchion et al., 161 Fed. 859, 89 C. C. A. 53, and McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136.

Applying the above principles of law to the facts in the case at bar, it is apparent that Jones, at the time he staked the Papoose fraction, was a wrongdoer, and an intruder and trespasser upon the possessory rights of the defendants in error in and to the Navajoe claim; and that his attempted location of the Papoose fraction, at the time and in the manner he did, was a nullity and void for any purpose, and initiated no rights whatsoever in him, for the reason that the ground covered by such attempted location was, at the time that location was made, in the eye of the law, in the exclusive possession of the defendants in error, under a valid and subsisting location, and they were unaware of, and had not been notified of, the excess, by the plaintiffs in error, nor were they given any opportunity to exercise their right to select and cast off. Until they had received such notice, and were given an opportunity to exercise such right, the whole claim, including any excess due to honest mistake and free from fraud, was so far segregated from the public domain as to exempt it or any part thereof from relocation. In Kendall v. San Juan Mining Co., 144 U. S. 663, 12 Sup. Ct. 779, 36 L. Ed. 583, a case involving the validity of a location of a mining claim upon an Indian reservation which had been set apart for "the absolute and undisturbed use and occupation of the Indians," the Supreme Court used the following pertinent language:

> "The effect of the treaty was to exclude all intrusion for mining or other private pursuits upon the territory thus reserved for the Indians. It prohibited any entry of the kind upon the premises, and no interest could be claimed or enforced in disregard of this provision. Not until the withdrawal of the land from this reservation of the treaty by a new convention with the Indians, and one which would throw the lands open, could a mining location

thereon be initiated by the plaintiffs. The location of the Bear lode, having been made whilst the treaty was in force, was inoperative to confer any rights upon the plaintiffs. * * * Had the plaintiffs immediately after the withdrawal of the reservation relocated their Bear lode, their position would have been that of original locators, and they would then have been within the rule in Noonan v. Caledonia Mining Co., 121 U. S. 393 [7 Sup. Ct. 911, 30 L. Ed. 1061]."

So in the case at bar, had the plaintiff in error Jones, after giving the owners of the Navajoe notice of the excess, waited a reasonable time for them to exercise the right to select and cast off, and then relocated the Papoose fraction, a very different question would be presented, and, by a subsequent discovery, he might then perhaps have brought himself within the rule announced in Mining Company v. Tunnel Company, 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501. This, however, he did not do, but relied upon his location of August 12, 1908, and this we hold was a nullity, initiating no rights; for, again to follow the doctrine of the Supreme Court, the right to the possession of mining property comes only from a valid location; if there is no location, there can be no possession under it. "A location to be effectual must be good at the time it is made." Belk v. Meagher, 104 U. S. 284, 26 L. Ed. 735. Consequently, a location void at the time it is made, because made on a claim valid and subsisting, continues and remains void, and is not cured or made effectual by subsequent discovery.

The conduct of plaintiffs in error in the location of the Papoose fraction, as appears from the record, was, in our opinion, unjustifiable, and is not to be sanctioned. Moreover, as Chief Justice Waite said:

"To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a relocation, will be to encourage unseemly contests about the possession of the public mineral bearing lands which would almost necessarily be followed by breaches of the peace." Belk v. Meagher, 104 U. S. 285, 26 L. Ed. 735.

The decision which we have thus reached renders it unnecessary to consider and determine the other questions presented in counsel's briefs.

The action of the District Court for Alaska in sustaining plaintiffs' motion to direct a verdict, and in entering judgment on the verdict, was right, and it is affirmed.

GILBERT, Circuit Judge (dissenting). Conceding that the plaintiffs in error could not lawfully make their location at the time when they attempted to make it, the question still remains whether or not the defendants in error had at the time of the commencement of the action such title that they could maintain ejectment against the plaintiffs in error who were in possession of the disputed premises. The

plaintiff in ejectment must recover, if at all, on the strength of his own title and not on the weakness or defect of his adversary's title. In the absence of fraud or bad faith, a mining claim which includes more ground than the law allows is not entirely void, but is void only as to the excess. Such is the language of numerous decisions and of the text-writers. The question arises: What portion of the excessive claim shall be deemed to be the excess? In the case of a lode claim located under regulations or a statute limiting the side lines to a certain width on each side of the vein or the discovery shaft, if the claim as marked is of greater than the permitted width, it is easy to ascertain where and what is the excess, and it would seem that the excess is open to immediate location by another. Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505; Lakin v. Dolly (C. C.) 53 Fed. 333; Bonner v. Meikle (D. C.) 82 Fed. 697-705. In Hausworth v. Butcher, 4 Mont. 299, 1 Pac. 714, the court said:

"The boundaries must be so definite and certain as that they can be readily traced, and they must be within the limits authorized by law; otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice and would be equivalent to no boundaries at all."

But in the case of a placer claim, where the only limitation is that it shall not exceed 20 acres, the precise part that shall be deemed the excess is not ascertained until the locator in the exercise of his right, on discovering that his claim is excessive, has readjusted his lines so as to exclude the excess. It is the logical deduction from the decisions that, if the original location was fraudulently made excessive, it is void in toto. If this be true, it would seem that if, after discovering that his claim is excessive, the locator willfully continues to maintain his lines as marked upon the ground, and fails within a reasonable time to cast off the excess, he places himself in the attitude of fraudulently asserting claim to a location greater in area than the law permits, the resulting invalidity of which would be the same that it would be if he had made the claim fraudulently excessive in the first instance. The defendants in error in this case failed, for a period of nearly three months after notice that their claim was excessive, to alter their lines so as to conform to the legal requirements. This failure to act, in my opinion, amounted to an active and intentional assertion of an excessive claim, and I submit it should be held that thereby the location became void.

But whether this conclusion is correct or not, in any proper view of the facts and the law applicable thereto the defendants in error are still fraudulently asserting an excessive claim. The only portion of their claim which they have cast off is that portion on which was their posted notice of location, their discovery shaft, and all their

extensive workings, and from which practically all the gold extracted from the claim since its location had been taken, and upon which they had, at the time of relocating their lines, ceased their mining operations. To cast off this portion of the claim as excess is but another way of maintaining a claim to the whole location as it was originally made. To hold that a locator of an excessive location may exhaust the mineral from a portion thereof, cast off that portion as the excess, and hold the remainder, would be to open the door to fraudulent location, and would be tantamount to deciding that such a locator, if he can succeed in working out a portion of the claim before notice is brought to him that his claim is excessive, may successfully locate, hold, mine, and exhaust a placer claim of greater area than the law allows. To hold so would be to render nugatory the express object of the mining laws which limit the size of placer locations, and would permit the miner to profit by his own wrong.

In view of these considerations, I submit that the defendants in error had no title or right of possession on which they could recover in ejectment, and that the trial court erred in directing a verdict for the defendants in error.

HARPER v. HILL ET AL.

1911. SUPREME COURT OF CALIFORNIA. 159 Cal. 250, 113 Pac. 162.

ACTION by H. A. Harper against Seymour Hill and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

SHAW, J.[33]—* * * The plaintiff sued to recover possession of a mining claim known as the "Santa Ynez gold mine." The principal controversy is in regard to the respective rights of the plaintiff and defendants to the southerly part of said Santa Ynez claim which overlaps the northerly part of a mining claim located by the defendants known as the "Lookout quartz claim." * * *

The Lookout claim was located and marked on the ground in 1889 by the defendants, and ever since that time they have claimed possession of it and have done the work required by law. The Santa Ynez was located and marked by the plaintiff on September 21, 1904. His claim of right to include in it a part of the ground covered by the Lookout claim is based on the theory that the southerly line of the latter is situated more than 300 feet from the actual line of the apex of the Lookout lode or vein. The facts appear to be that in 1889, when the defendants made the original discovery and location of the Lookout mine, they put monuments at each end of the claim at the place where they then believed the apex of the vein to

[33] Parts of the opinion are omitted.

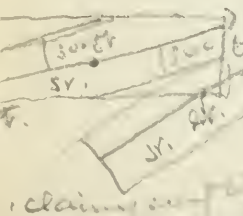
be. Corners were marked at each end at a distance of 300 feet from the end center monuments so placed, thus marking a claim 1,500 feet long and 600 feet wide, as the law provides and allows. At the trial evidence was introduced tending, as it is claimed, to prove that the monument so placed at the center of the east end of the claim had not been placed on the apex of the Lookout vein, but was located some 23 feet south of said apex. The findings describe, as the true line of the apex, a line running from the east line westerly through the claim. This line at its easterly end lies northerly of the line indicated as such by the original center end monuments. The court below was of the opinion that the actual line of the apex as disclosed by the evidence at the trial should control the boundaries of the claim, that the defendants had the right to only three hundred feet south of that line on the surface, and that, as the original southerly line was located more than that distance from the true line of the apex of the vein, such original line must be drawn in and the excess given to the plaintiff under his later location. The main question is whether the surface location and boundaries of a mining claim are to be determined by the position of the apex of the vein as it is ascertained and marked on the ground, in good faith, at the time the claim is originally located and marked, or by the real position of such apex as it may be subsequently proven to be, in a trial with an adjoining claimant.

Section 2320 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 1424), so far as material to the question, is as follows: "A mining-claim located after the tenth day of May eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the vein located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface. * * * The end lines of each claim shall be parallel to each other." Section 2322 (page 1425) provides that the locators of a mining location "on any mineral vein, lode, or ledge," on the public domain, so long as they comply with the laws of the United States and local regulations consistent therewith, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically" although, below the apex, such veins, lodes, or ledges may diverge beyond the side line planes, but not where they go outside the end line planes. Section 2324 (page 1426) provides that "the location must be distinctly marked on the ground so that the boundaries can be readily traced," and that all records of mining claims shall contain "the date of the location, and

such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." Sections 2325 and 2326 (pages 1429 and 1430) provide, in substance, that the owner of such mining location may obtain a patent from the United States therefor by procuring the Surveyor General to survey and plat the same, filing an application in the proper land office and giving notice as directed. It is declared in section 2325 that "a patent for any land claimed and located for valuable deposits may be obtained"; that any person "having claimed and located a piece of land" may file application for a patent therefor.

The grant of the exclusive right of possession and enjoyment of the ground included within the lines of the location is a present grant which takes effect as soon as the location is legally made. It refers to the lines as then established, and gives the right to the ground inclosed thereby. The necessary implication of the language is that the "surface included within the lines of their locations" which they have an immediate right to possess and enjoy is the surface as then "distinctly marked on the ground." The statement that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface," if taken strictly and literally, might seem to refer to the actual position of the apex, rather than to the place marked as such by the locator. But the other provisions require a different interpretation.

The reference is to the vein as honestly marked by the claimant at the time as the center of the claim of which he then takes possession. There are also practical reasons which forbid such literal construction. Lodes or veins frequently do not appear upon the surface except at intervals. Sometimes they may not appear at all. The true apex or middle of the vein may not be accurately determinable except by extensive excavations. The eastern end of the vein of the Lookout mine was covered with soil at the time of the location. Its true position was only disclosed by subsequent excavations, and it is still in dispute. Such veins do not run in straight lines throughout their courses, but with many turns and angles. Detached masses projecting above the surface may be mistaken for the ledge or vein. The ore may occur in a blanket formation having no distinct apex. If the construction contended for should prevail, a mining location which the law declares shall secure an immediate right of possession to the surface within the marked lines would often be a mere float, a tentative location, to be changed and adjusted from time to time to the actual location of the vein, at the instance of adjoining claimants, as subsequent developments may indicate. It would not become fixed and permanent as against third persons, until the patent was issued. That the location, as made, may not be binding on the United States, and that in making the survey for a patent the Surveyor General may ascertain and locate the true line of the apex to



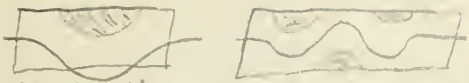
fix the boundaries, may be conceded. See Howeth v. Sullenger, 113 Cal. 551, 45 Pac. 841. But it is the clear intent of the statute that in the meantime, and as against all others, the locator who has in good faith made the discovery and marked the boundaries with regard to the position of the apex as he then finds and believes it to be shall be protected in the possession of the surface thus ascertained, and that the monuments he then sets shall control the location of the claim. Any other interpretation would produce great confusion and uncertainty, and invite disputes and litigation. The object of the enactment of the statute, which evidently was to give certainty of location and security of titles to mining claims and prevent litigation over them, would be defeated.

Substantially the same effect was given to the statute by the Supreme Court of Nevada in Golden Fleece Co. v. Cable Con. Co., 12 Nev. 329, and Gleeson v. Martin White M. Co., 13 Nev. 456, Chief Justice Beatty, then of the Supreme Court of Nevada, writing the opinion. * * *

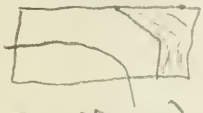
The point of the decision [in the Gleeson case] is that the rights of the parties are fixed by the lines marked on the ground when the location is made. If the lines so fixed protect subsequent locators against changes afterwards sought to be made by the first locator, they must be equally potent to protect the first locator against changes sought to be made against his interest by subsequent locators. The general principle that the location as made on the ground controls the rights of the parties is stated in the following cases: Iron S. M. Co. v. Elgin, etc., Co., 118 U. S. 207, 6 Sup. Ct. 1177, 30 L. Ed. 98; Watervale M. Co. v. Leach, 4 Ariz. 34, 33 Pac. 420; Wyoming Co. v. Champion Co. (C. C.) 63 Fed. 548; Mining Co. v. Tarbet, 98 U. S. 468, 25 L. Ed. 253; and Leadville Co. v. Fitzgerald, Fed. Cas. No. 8,158.

There are many cases which establish the doctrine that where the locator has marked his corners so that the side lines lie more than 300 feet from the apex of the vein as located by him at the time, or otherwise marks a claim larger than the limits allowed by the statute, he cannot, as against a subsequent locator of adjoining ground, claim the excess, and that a court may adjudge that his side lines shall be "drawn in" to a position not more than 300 feet from the general course of the center line. McElligott v. Krogh, 151 Cal. 132, 90 Pac. 823; Howeth v. Sullenger, 113 Cal. 551, 45 Pac. 841; Southern Cal. R. Co. v. O'Donnell, 3 Cal. App. 386, 85 Pac. 932; Thompson v. Spray, 72 Cal. 533, 14 Pac. 182; English v. Johnson, 17 Cal. 118, 76 Am. Dec. 574; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480; Richmond v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273. These and other cases to the same effect are cited by the plaintiff in support of the proposition that the side lines will be drawn in when the court, upon evidence taken and in the light of developments subsequent to the original location, ascertains that the locator mistook the actual

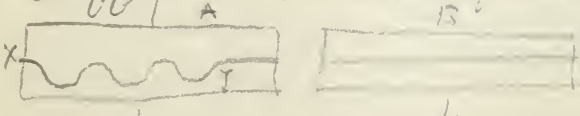
(2) O wd. line with bearing in one direction.
(3) Every purpose of Act. in making requiring:
(a) good faith (b) not more than 1500 x 600 ft. in location (c) extralat. rights to be governed by the length of apex in the claim
(4) Col. sections lead to absurd results —



(5) Col. claim appears again on Bonanza that rights of extralat. rights in perp. — the best case of —



Col. It says this involves end lines not parallel / But, square — would it / not be governed by lines drawn just as if would if lines were another location or a part? Simply limited vertical area unpatented?
But much better to say that one can draw end line straight in any case even if that does not part of surface more than 300 ft from center of vein, otherwise hence to get his extralat. rights by making his end lines parallel — just as he can for another claim pt.
What purpose?
Really Col. case sticks in the craw. 300 ft from each side of vein includes on each side of typical vein — reform to ideal or perfect location. This must be adopted to veins that depart from the ideal.
6 applies same to crossing of veins —



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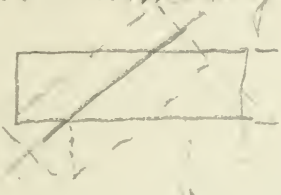
vein. In B vein is straight and this gives 1500 ft on surface. In A x-y = 1500 ft. Is AE heave and 1100 ft on surface and can 1100 ft on dip?

Walsh v. Mueller, 16 Mont. 150 is sometimes referred to in connection with this controversy.



Two questions here (a) excess of surface? (b) excess of dip. Seems to have been considered (a) wrongly and (b) rightly.

Say there was (a). All there was here was an insignificant [illegible] laying out original vein to surface and surface would make claim void. If this was so as to get excess of surface Cot. says it is highly questionable. But in that case there was no excess to justify the claim, — so SC did not even deliver a dictum on the subject. As to excessive dip, this would be used to thereby prevent [illegible] of vein.

But —

Here one would get more of vein between surface & claim than by following along vein — but either way one did get the whole in either case. Injury = same thing in results.

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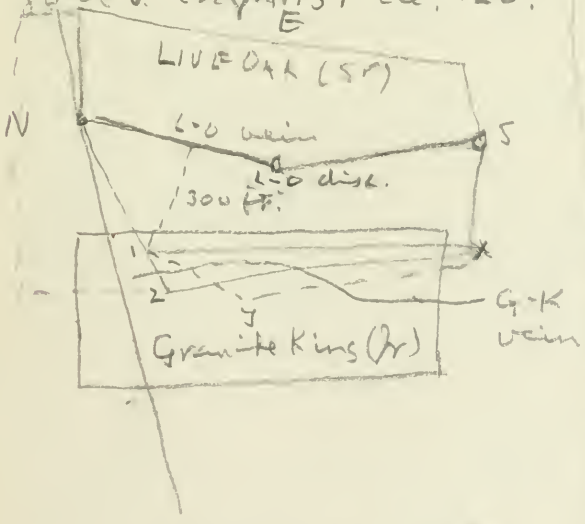
In addition to location, [illegible] applies Col. view (158 448-9). But weight & authority as well as principle [illegible] with H.v. H.

Q. Suppose Col. Dr time in force, can such an excessive location, made in error, be cured? Those who adhere to Col. Dr time say yes - in two ways (1) by [illegible], (2) judicially.

Peabody G.M. Co. v. Goodtitle M Co 97 Fed. 657 is a case of (1). Every one agrees that "no such [illegible] worked to take any part of the plaim after patent issued." [M. p. 27] So - Argonaut Co M+M Co v. Turner, 23 Col. 400.

It is said that (2) illustrated by Mitchell-[illegible] v. Kreutzer, 151 Col. 126:



Line of main pat.

Q. Why is dive'd not such a case? To double the land grant? Why not lay out other land instead, & get patent, but limit [illegible] to extra-lateral rights?

There are three possibilities - (1) mere wrong, Ct. intimates as much pp. 136-7. (2) Did not think extra-lat. rights important when location made, (3) The L-O was in fact laid out on such [illegible] as to make [illegible]

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Dotted line) and made left that unit. Here the ct. fixed a new corner 300 ft. from L-O vein at 1 and drew a new side line 1-X. That allowed grantee King (Dr.) to locate and hold in ejectment the triangle 1-X-2. Q. Why not draw new line 1-y-X? This would be 300 ft from vein the natural way. But objection is that in that it would go out of L-O limits after G.K. had acquired a right. Hence only correction would be to establish a new NW corner and new side line from that corner. Q. How could ct in ejectment establish a new boundary in this way? Notice this was not a patent (adverse) proceeding.

Equity powers in legal action under code?

Really had to find out how much of L-O within GK strike was used for excess in order to render judgt. in ejectment. Here owners of GK were [illegible] and so the writ of habere facias would have to show just how much they would be entitled to be put in poss. of. This is related establishment of boundary - determination of how much of L-O was used for excess and hence open to location by G-K.

It now appears however from what is said in H v. H (217*) that in McG v. K the facts were, was that

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in a location 1500 x 600 ft the side line somewhere can never be more than 300 ft from vein, but then the area laid out was more than 1500 x 600. Hence case remanded with H.v H.

Q. How reconcile Mc£ v K. with Lt Jones v. Wild Goose Co. 207? Why should ct. draw in lines in Mc£ v. K so as to cut off K land? Why not let K draw in on £? In Mc£ v. K. the notice + record called for 300 from vein. Vein was correctly traced, but in working was to side, got side line too far over. Here Court corrected the markings to conform to the notice. Of course this cannot be possible in a placer claim.

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location of the vein where it does not show upon the surface, and that the mining claim is always subject to change of position if new evidence or discoveries demonstrate that the vein is situated elsewhere than in the position it was supposed to occupy. None of them supports the proposition. In each the court assumed that by some mistake the side line or corner had been originally located too far from the place located as the apex of the vein, and the question involved and decided was the effect of such a mistake in measuring from the center stake or monument. For example, in McElligott v. Krogh, although it is not expressly so stated in the opinion, the fact was, as the record on file shows, that the court found that the true line of the vein and the line thereof as originally located were substantially identical. The question of the effect of a difference between the actual place of the apex and the original monuments set to locate it was not presented, and nothing said in the opinion can be taken as an expression of an opinion upon that question.

Of course, we do not here consider the effect of a fraudulent or intentional mislocation of the vein. The evidence shows that at the eastern end the vein did not appear upon the surface, and that the defendants erected the center monument at that end of the Lookout claim in good faith at the point where they believed the vein extended across the end line thereof. Upon the facts found and shown by the undisputed evidence, the court erred in giving to the plaintiff the ground included within the original limits of the Lookout location and embraced in the overlap of the Santa Ynez claim. We have assumed that the evidence is sufficient to show that the vein is situated off the located line as the findings declare. The appellants earnestly contend that the findings are without support in this particular. Our conclusion that the original monuments control makes it unnecessary to consider this question of the sufficiency of the evidence. * * *

The judgment and order are reversed.

Section 4.—Record.

FEDERAL STATUTES.

Sec. 2324. * * * All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. * * *—Rev. St. U. S., § 2324.

COLORADO STATUTES.[34]

The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

[34] See note 1, ante. In Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. 211, where a state statute required the recorded loca-

First—The name of the lode.
Second—The name of the locator.
Third—The date of location.
Fourth—The number of feet in length claimed on each side of the center of discovery shaft.
Fifth—The general course of the lode as near as may be.—Rev. St. Colo. 1908, § 4194.

Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty shall be void.—Rev. St. Colo. 1908, § 4195.

No location certificate shall claim more than one location, whether the location be made by one or several locators. And if it purport to claim more than one location it shall be absolutely void, except as to the first location therein described, and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all. —Rev. St. Colo. 1908, § 4196.

(a) *Original Record.*

STURTEVANT v. VOGEL ET AL.

1909. CIRCUIT COURT OF APPEALS. 93 C. C. A. 84, 167 Fed. 448.

IN error to the District Court of the United States for the Second Division of the District of Alaska.

The plaintiff in error brought ejectment against the defendants in error to recover the possession of a placer mining claim. The jury returned a verdict for the defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts above).[35]—The plaintiff in error contends that, both by the laws of Alaska and the custom of the miners, the recording of the location notice within 90 days after location is essential to the life of the location, and that a failure to so record the same results in the forfeiture thereof. But one witness was called to prove the alleged custom of the miners, and his testimony falls short of showing the existence of any custom or regulation adopted by the miners, in the district where the claim is

tion certificate to contain "the dimensions and location of the discovery shaft, or its equivalent" and "the location and description of each corner, with the markings thereon" and the state Supreme Court had held a location invalid because the statute was not complied with, the United States Supreme Court held that the statute was valid and affirmed the state court's decision. See also Clason v. Matko, — U. S. —, 32 Sup. Ct. 392.

[35] The statement of facts is abbreviated and parts of the opinions are omitted.

located, making the recording of the notice of location essential to the right to hold the same. * * *

Section 2324, Rev. St. (U. S. Comp. St. 1901, p. 1426), provides that all records of mining claims shall contain the name or names of the locators, the date of the location,[35a] and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. This provision does not require that the location be recorded. It leaves the subject open to legislation by the states or to regulation by the miners. Haws v. Victoria Copper Mining Co., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436; 1 Lindley on Mines (2d Ed.) 373, and cases there cited. It is contended that section 15, c. 786 [Alaska], Act June 6, 1900, 31 Stat. 327, requires that notice of the location of a mining claim shall be filed for record within 90 days of the discovery of the claim. The section requires recorders, upon the payment of fees, to record separately certain classes of instruments, such as deeds, mortgages, certificates of marriage, wills, official bonds, etc., including affidavits of annual work done on mining claims, notice of mining locations and declaratory statements; and in subdivision 11 it adds to the list such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers and others:

"Provided, notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice."

This statute permits the recording of instruments. It contains no positive enactment that any of the enumerated instruments shall be recorded, nor does it provide that the failure to record any instrument shall work a forfeiture of rights thereunder. Obviously by the terms of this statute an unrecorded deed is not rendered invalid as between the parties, nor does the mere failure to record a mining location work a forfeiture thereof. We are therefore not called upon to decide the question, discussed by counsel, whether a statutory requirement that the location notice be recorded is mandatory or merely directory.

In the decisions of Montana relied upon by the plaintiff in error, we do not find support for his contention that, under the law of Alaska, failure to record location notice should be held to work a forfeiture of a mining claim. In King v. Edwards, 1 Mont. 235, the question for decision was whether the failure to perform the prescribed amount of work upon a claim resulted in forfeiture. The

[35a] In the absence of a statutory reference fixing some other date, "the date of the last act to be done on the ground seems obviously to be the date of location. It can not include the date of record because the record under the act of congress must give the date of location, which to be so given must necessarily be precedent to the paper reciting it, except of course that the record might be made on the same date that the last act was performed on the ground." Morrison's Mining Rights, 14 ed., 117.

court found that it was generally considered, among the miners of the district in which the claim was situated, that such a failure would have that effect, and said that:

"Where a custom is plain, there is no room for construction, and the court must take it as it reads and give it its legal effect."

* * *

In Last Chance Min. Co. v. Bunker Hill & S. Min. Co., 131 Fed. 579, 66 C. C. A. 299, this court held that the failure of the locator of the Bunker Hill claim to record his notice of location within the time prescribed by the Idaho statute did not work a forfeiture of the claim, there being no such penalty affixed by the statute; citing Jupiter Min. Co. v. Bodie Con. Min. Co. (C. C.) 11 Fed. 666, Bell v. Bed Rock T. & M. Co., 36 Cal. 214, and other cases from California and Arizona. In Zerres v. Vanina (C. C.) 134 Fed. 610, Judge Hawley construed Comp. Laws Nev. § 210, providing for the location of a lode mining claim, and declaring that within 90 days of the date of posting the location notices on the claim the locator shall record his claim within the mining district, etc., and held that, since the statute did not provide for a forfeiture for a failure to record within the time specified, the failure was insufficient to work a forfeiture of the locator's right. And in Ford v. Campbell, 92 Pac. 206, the Supreme Court of Nevada said that the intention that failure to comply with the statute should work a forfeiture of mining rights "ought not to be imputed to the Legislature except upon the very clearest language, not susceptible to any other reasonable construction," and quoted with approval the language of Judge Hawley in Zerres v. Vanina. Of similar import are Johnson et al. v. McLaughlin, 1 Ariz. 493, 4 Pac. 130, and Rush v. French, 1 Ariz. 99, 25 Pac. 816. * * *

We find no error for which the judgment should be reversed. It is accordingly affirmed.

Ross, Circuit Judge (dissenting).—* * * In respect to the mining ground of the territory of Alaska, however, Congress, in section 15 of the act of June 6, 1900, "making further provisions for a civil government for Alaska and for other purposes" (chapter 786, 31 Stat. 327), provided that "notices of location of mining claims shall be filed for record within ninety days from the date of discovery of the claim described in the notice." Smith v. Cascaden, 148 Fed. 793, 78 C. C. A. 459. The recording of the notice of location is therefore, by a statute of the United States, made one of the essential steps to a valid location of a mining claim in the territory of Alaska. * * *

It therefore seems to me that the location under which the defendants in error claim was never perfected, because they did not take one of the essential steps required by the statutes of the United States; that is to say, they did not file for record within 90 days

from the date of the discovery of the claim, nor at any time, a notice containing the name or names of the locators, the date of the location, and such a description of the claim located by reference to some natural object or permanent monument as would identify it. The case here presented, therefore, is not, in my opinion, one of forfeiture, for the defendants in error never took one of the essential steps required in making their location.

In the case of Last Chance Mining Company v. Bunker Hill & S. Mining & C. Co., 131 Fed. 579, 66 C. C. A. 299, referred to in the opinion of the court, there was a question of priority between the Last Chance mining claim and the Bunker Hill mining claim. Priority was asserted for the Last Chance only upon the fact that it was located, marked, and the notice of its location recorded before the location notice of the Bunker Hill was recorded. * * * The facts as found by the master, and which were accepted by the court, were that the Bunker Hill claim was located September 10, 1885, by one O'Rourke; * * * that on September 29, 1885, O'Rourke caused a notice of location of the claim, duly verified, to be recorded in the office of the recorder of the county in which it was situate; * * * that the Last Chance claim was duly located September 17, 1885, and the location notice thereof recorded on the 22d day of the same month; that prior to the discovery and location of the Last Chance its discoverers and locators "had actual knowledge of the discovery and location of the Bunker Hill claim; they had visited the discovery, read the notice posted thereon, saw the discovery stake, the east end stakes, and knew that the locator was in the actual possession of the claim, and was then engaged in development work thereon." * * *

In the case of Last Chance Mining Company v. Bunker Hill & S. Mining & C. Co., therefore, it appeared that the claimants of the Last Chance claim entered upon the actual possession of the locator of the Bunker Hill claim while the latter was a valid, subsisting claim, and while its locator was actually engaged in working it. That ground was, therefore, not open to location by the Last Chance claimants, for which reason they acquired no right. And since the statute of the United States applicable to that case did not require the recording of such notices of location, and the statute of Idaho did not fix any penalty for the failure to record such notice within the time it prescribed, the government of the United States issued its patent in perfection of the Bunker Hill location, and this court very properly sustained that title, and held that the recording by the Bunker Hill claimant of his notice of location three days later than the time prescribed by the Idaho statute did not work a forfeiture of his rights. In the case now before us, however, there was no actual possession of the ground by the defendants in error, and they never at any time filed the notice of location required by the Alaska statute.

The location under which they claim, therefore, lacked one of the essential elements of a valid location in Alaska. No question of forfeiture, in my opinion, arises in the case. The ground was confessedly vacant, and was therefore open to exploration and location, unless covered by a location which met the requirements prescribed by Congress.

For the reasons stated, I dissent from the judgment here given.

FARMINGTON GOLD-MIN. CO. v. RHYMNEY GOLD & COPPER CO.

1899. Supreme Court of Utah. 20 Utah 363, 58 Pac. 832.

Action by the Farmington Gold-Mining Company against the Rhymney Gold & Copper Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Bartch, C. J.[36]—The main question presented for our consideration in this case is whether the notice of location of the Rhymney mining claim, with the supplementary proof, was properly admitted in evidence. The ground of the objection appears to be the uncertainty in the description. The notice reads as follows: "Notice is hereby given that the undersigned, having complied with the requirements of section 2324 of the Revised Statutes of the United States, and the local laws, customs, and regulations of this district, has located 1,500 feet in length by 600 feet in width on this, the Rhymney mine, lode, vein, or deposit, bearing gold, silver, and other precious metals, situated in the Farmington mining district, Utah territory, the location being described and marked on the ground as follows, to wit: Situated about one mile and a half eastward from the depot, under a large cliff of rock. I claim from this notice 750 feet southeasterly, to a monument of stone; thence northwesterly, from this notice, 750 feet, to a monument of stone. The mining claim above described shall be known as the 'Rhymney Mine.' Located this 7th day of January, 1884. Names of locators: Hyrum E. Haynes." The notice was recorded May 19, 1884.

The appellant insists that it was so indefinite and uncertain that it did not impart notice to the public, and that the claim was not tied to a natural object or permanent monument so as to identify it, as required by section 2324, Rev. St. U. S. * * *

In addition to the date of location and name of the locator, however, the statute requires the record to show such description of the claim located "by reference to some natural object or permanent monument as will identify the claim." It must be admitted that the

[36] Part of the opinion is omitted.

is plausible for such cases as the Mo. statute — but here, e.g., State ex rel. v. Vogel, where [illegible] was in the least burdensome or unreasonable. Or simply take cases on New and Mont. statutes establishing a general rule about statutes of limitations running against persons under disability or [illegible] plaintiff as to [illegible] of former but not. Stat. I think it is plain as day I believe record ought to be held mandatory and strict statutory requirements of [illegible] unreasonable and so if no effect as to such details. This is illustrated by the controversy formed over verification of the declaration statement which Mont. used to prescribe as a [illegible] of the required record. After much controversy, this requirement was held valid in the Mont. S.C. O'Donnell v. Sloan, 8 Mont. 298; Hickey v. Prescott, 16 Mont. 284 (Bonsfield); Hickey v. Anaconda Copper Min. Co. 32 Mont. 46. SCUS declined to [illegible] a decision on it in Hickey v. Purcell, 117 U.S. 401, [illegible] it in Preston v. Hunter, 67 Fed. 976. Finally it was repealed. Naturally [illegible] legislation [illegible] assumptions [illegible] many — but if we engage in [illegible] any function they may [illegible]. Here Stat. permissive — if one accepts he get [illegible]

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no fair exact by construction — as it stands v. S.V. where shaft, head direction intersect perfectly rectangular and vertical and horizontal because language is known to mean such direction, because surface assumed level and horizontal. Congress clearly assumed veins would be regular & continuous — hence (1) & hold provision for certain direction, defects pretty evident, & provisional plan — meant to leave Local of record & local regulation. (2) To be depth, provision must go to form at time of act. Here it goes to the date act. See Sedgwick, Construction of Statutory & Const Law, 2 ed., 317-18. See also Discussion of the construction of Statutes as to record of mining claims, 1 Snyder, §§ 420-423. Lindley accepts this doctrine without comment.

Time within which to record. The point is obscure suggests at once a distinction between requirement of record and requirement of record in a certain time. There is no reason why requirement that be certain certificate be recorded in a certain time should not be held directory to this extent — that if no intervening rights have been acquired, a subsequent record will suffice. See Preston v. Hunter, 67 Fed. 996 (it was before it was) (by notice) the title is good by relation (but all have gone even further as we think and in accordance v. Brownlee v. Hicks, 4 Ill. 326, 11

Description of the claim — "must be so described with reference to some natural object or permanent monument as to identify the claim." This requirement was under consideration in Farmington G. M. Co. v. Rhymney Gold & Copper Co., 2 Ch. 592 — the location was not sufficient — if one reading the notice would not be able to find the claim — [illegible]

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notice is indefinite in not stating the number of feet in width claimed on each side of the point of discovery, or monuments of stone referred to therein, and should therefore be limited to an equal number of feet on each side. When so limited, it would seem to be sufficiently definite, and, thus viewed, the description would seem sufficient to indicate to a subsequent locator the intention of the claimant as to the number of feet claimed.

Nor, under the circumstances as shown by the proof, is the objection to the location that the claim was not so tied to a natural object or permanent monument as is required by law well grounded. The notice, indeed, appears to be somewhat uncertain in not stating the kind of depot referred to, and not giving the exact distances and direction the claim is from the depot; but these were matters of fact, which could be shown by evidence outside the notice, and on this point the record contains evidence showing that at the time the location was made the Union Pacific Railway depot was the only depot in the mining district where the claim was located; that there was but one large cliff of rocks, 1½ miles east of that depot; that the Rhymney claim was located at the base of that cliff of rocks according to law; and that a vein or lode was discovered by the locator within the limits of the claim. Under the circumstances thus shown in evidence, the location was sufficient to impart notice to any subsequent locator of the fact of an asserted claim, and the notice, although imperfect, supplemented by such proof, was properly admitted in evidence.

With just how much accuracy the description of a mining claim, in reference to a natural object or permanent monument, must be stated in the notice of location, is not set forth in the statute, and where, as in this case, the location was evidently made in good faith, we are not disposed to hold the locator to a very strict compliance with the law in respect to his location notice. If, by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient. Prospectors, as a rule, make no pretensions of scholarship or of the art of composition, are neither surveyors nor lawyers, and if, in their notice of location, technical accuracy of expression were an absolute requirement, the object of the law, which doubtless is the encouragement and benefit of the miners, would in many cases be frustrated, and injustice would result, by the disturbing of possession after much hard labor performed and money in good faith expended. Therefore mere imperfections in the notice of location will not render it void. Courts have usually construed the statute respecting the location of mining claims with much liberality, and the sufficiency of the location, with reference to natural objects or permanent monuments, is simply a question of fact. Lindl. Mines, §§ 381, 383; Erhardt v. Boaro, 113 U. S. 527,

5 Sup. Ct. 560; Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. 863; Brady v. Husby, 21 Nev. 453, 33 Pac. 801; Flavin v. Mattingly, 8 Mont. 242, 19 Pac. 384; Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654; Mining Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886; Wilson v. Mining Co. (Utah) 56 Pac. 300.

According to the record, the Rhymney claim was located in 1884 by the respondent's predecessor, and the same ground was, in 1896, attempted to be located as the Gray mining claim by the appellant. For 12 years, as appears, prior to the attempted location, the respondent and its predecessors in interest had located, worked, and developed the claim, expended large sums of money thereon, and substantially complied with all the laws and the customs and regulations of the mining district. Under these circumstances, to permit the appellant to recover, on purely technical grounds, would not only be a great injustice to the respondent, but, doubtless would be a menace to the titles of many mining properties in this state which hitherto have been unquestioned and unquestionable. The record presents nothing which justifies a reversal of this case. The judgment is affirmed, with costs.[37]

STRICKLAND v. COMMERCIAL MINING CO.

1909. Supreme Court of Oregon. 55 Ore. 535, 106 Pac. 1017.

This is a suit by George Strickland against the Commercial Mining Company, a corporation, to determine the right of possession of about six acres of mineral land in Baker County, Or. The amended complaint states in effect that on May 2, 1896, Miles Rat-

[37] "It is next claimed by the appellant that the notice of location of the Franklin and Clift claims was indefinite and uncertain as to locality, and should not have been received in evidence. It appears that the Clift claim was located in 1888, and was a relocation of the Old Susan ledge. It was where the Old Susan mine was located. The testimony shows that the Old Susan had been a shipper of ore and a dividend payer for years. The notice recites, 'This claim shall be known as the Clift mining claim, and was known as the Susan ledge, about 2 miles south of Diamond City, Tintic mining district, Utah.' The Franklin claim was located in 1893, about 1½ miles south of Diamond City, on the west side of the Clift claim. One was located adjoining the other. The testimony shows that Diamond City and the Old Susan mining ledge had a notoriety in that vicinity, and were well known. Work had been performed on these mines to keep up the assessment work since their location. Taking all the facts into consideration, we are of the opinion that the notices were sufficient. The construction of a notice for a mining location should be liberal, and not technical, and the sufficiency of a notice with reference to natural monuments or permanent objects is a question of fact. Wilson v. Mining Co., 19 Utah, 66, 56 Pac. 300; Farmington Gold-Min. Co. v. Rhymney Gold & Copper Co. (Utah) 58 Pac. 832." Miner, J., in Fissure Min. Co. v. Old Susan Min. Co., 22 Utah 438, 63 Pac. 587.

cliff, a qualified entryman, duly located the Summit, a placer mining claim; * * * that about October 21, 1902, the defendant unlawfully entered upon a part of such claim and located the Rainbow, a quartz mining claim, the boundaries of which overlap those of the Summit; that about March 8, 1907, the defendant, having secured a survey of its claim, applied for a United States patent therefor, wrongfully asserting that it was in the possession of the whole of the Rainbow claim; that within the time prescribed the plaintiff filed in the local land office an adverse claim and instituted this suit. For a second cause of suit it is averred that on October 27, 1905, the plaintiff was the owner and in the possession of the Sunbeam, a quartz mining claim, which embraces practically the same premises as the Summit, both of which are overlapped by the Rainbow. The answer denied the material allegations of the complaint. * * * The cause having been tried, the suit was dismissed, and the plaintiff appeals. Affirmed.

MOORE, C. J. (after stating the facts as above).[38]—The evidence shows that a declaration was entered of record in Book F, p. 72, of Placer Locations of Baker County, May 6, 1896, of which the following is a copy:

"Notice is hereby given to whom it may concern, that I, the undersigned, citizen of the United States, over the age of twenty-one years, have this day located under the Revised Statutes of the United States, chapter six, title thirty-two, the following described placer mining ground, viz.: 20 acres of placer ground in this gulch, claiming 1,500 feet in length by 350 feet in width. This gulch empties into South Dixie creek. This gulch heads within a mile of the gulch that empties into Mormon Basin, situated in ——— mining district, Baker county, Oregon. This claim shall be known as the 'Summit Placer Mining Claim,' and I intend to work the same in accordance with the local customs and rules of miners in said mining district. Dated on the ground this 2d day of May, 1896. Miles Ratcliff, Locator."

It further appears that when this notice was given, the land embraced within the Summit had been surveyed by the general government, but that the claim, as now laid out, did not conform with the lines of the public survey, as required by act of Congress. Rev. St. U. S. § 2329 (U. S. Comp. St. 1901, p. 1432). The reason assigned by the locator for departing from such direction is that prior locations of other claims, and the peculiar conformation of the ground, necessitated the location of the Summit in such a manner. The testimony of Ira L. Hoffman, a surveyor who appeared as the defendant's witness, is to the effect that the boundaries of the Summit cannot be established, with any degree of certainty, from an inspection of the recorded notice. It also appears from testimony that "this gulch," referred to in the notice, and

[38] Parts of the statement of facts and of the opinion are omitted.

in which the Summit is located, heads at the same place as "the gulch that empties into Mormon Basin," so that a pebble would separate falling rain or melting snow, causing the water to flow in either gulch. An inspection of the recorded notice imparts no information to interested persons of the definite location of any claim.

The statute in force when the Summit was set off required the posting of a notice on the lode or vein of a quartz claim (2 Hill's Ann. Laws 1892, § 3828), but no provision was made for the locating of placer claims, or for the recording of notices thereof. Placer claims are subject to entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims (Rev. St. U. S. § 2329); that is, according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States (Rev. St. § 2319 [U. S. Comp. St. 1901, p. 1424]). It is unnecessary to inquire whether or not the custom or rule of miners in the district where this claim lies required a notice of location to be recorded, for if such was essential, the notice hereinbefore designated is insufficient, and if no record were necessary such notice was ineffectual, so that in either case the notice recorded could not initiate a right to the premises.[39] * * *

Assuming, without deciding, that the act of setting stakes at the corners and at the end of the Summit inaugurated a possessory right thereto, we think that such right was not maintained by sufficient notoriety to be preserved by a decree, for the testimony shows that when the Rainbow was located, on search being made in the vicinity for conflicting boundaries, no monuments were found, except a stake outside the claim, which a witness said looked like it had been lying there 15 years, and it had no writing or marks thereon evidencing the location of any claim. When the Rainbow was laid out, the locators discovered that some improvements had been made on the ground where it is now asserted the Summit was established, but all the work thereon appeared to have been done many years prior

[39] "It is further contended that neither of said certificates are sufficient in form, for the reason neither contains a description of the location of the claim with reference to some natural object or permanent monument as will identify the claim as is required by subdivision 3 of section 3, supra. The description given in both certificates is substantially the same, and is as follows: 'Said claim is situated about two miles from the town of Amargosa.' No direction is given, and the claim might be anywhere within an area of from six to eight square miles, and still answer to the description given. We think it needs no argument to convince the mind that such a description is not a substantial compliance with the requirements of the statute, even though the courts are very liberal in such matters, and ordinarily it is a question of fact for the jury to determine. Brady v. Husby, 21 Nev. 453, 33 Pac. 801. So far as the certificates of location in question in this case are concerned, plaintiffs are in no better position than if no certificate or certificates had been made or filed." Norcross, J., in Ford v. Campbell, 29 Nev. 578, 92 Pac. 206.

thereto; one witness saying that it seemed as if such labor had been performed in the year 1862. * * * We do not mean to be understood as holding that the failure of a person to find stakes on a placer claim would justify another location embracing the whole or a part of the premises, for it might be that such monuments had been purposely destroyed by some person who desired to locate another claim thereon. Where, however, the appearance of a mining claim unmistakably indicates an abandonment of the premises for many years, and no stakes or other monuments mark the boundaries, such evidence warrants the assumption that all possessory right thereto has been relinquished, and authorizes another location thereon.

The plaintiff, on October 27, 1905, located the Sunbeam, a quartz mining claim, the boundaries of which are almost identical with the exterior lines of the Summit, but as the former claim was not laid out until after the Rainbow, also a quartz claim, was located, no right thereto, so far as the boundaries thereof conflict, can be initiated by the attempted relocation. Lindley, Mines (2d Ed.) § 413.

Believing that no error was committed in dismissing the suit, the decree is affirmed.

BUFFALO ZINC & COPPER CO. v. CRUMP ET AL.

1902. SUPREME COURT OF ARKANSAS. 70 Ark. 525, 69 S. W. 572.

ACTION by the Buffalo Zinc & Copper Company against G. J. Crump and others. From a judgment for defendants, plaintiff appeals. Reversed.

BATTLE, J.[40]—This action involves the validity of mining claims. * * *

The following questions are presented by the pleadings and evidence in this case for our consideration and decision: * * *

Third. Were the locations of the Bell and White Eagle claims by Rose Ann Kaylor and Francis E. Blake valid? * * *

3. Appellees insist that the locations of the Bell and White Eagle claims, as made by Rose Ann Kaylor and Francis E. Blake, were invalid. They say that the description of the Bell claim in the notice of location by Kaylor was insufficient. It is as follows:

"Beginning at the N. W. corner of El Williams, 1—16, at a black oak post; thence 1,500 feet north between Sec. 10 & 11 to a dogwood bush; thence 600 feet E. to a dogwood bush; thence 1,500 feet south to oak post in Williams' field; thence 600 feet to place of beginning. This being in the northwest quarter of the southwest quarter, Sec. 11, T. 17, range 15 W."

They base their contention upon the fact that there is nothing in the record which shows what is meant by "El Williams, 1—16,"

[40] Parts of the opinion are omitted.

named in the notice as the beginning point. But it does show that it was at a black oak post, and 1,500 feet north of it was a dogwood bush between sections 10 and 11, which must have been on the line between those sections, and that the claim described was in the N. W. ¼ of the S. W. ¼ of section 11, township 17, range 15 W., in Marion county, in this state. The presumption is that it (El Williams, 1—16) is a well-known natural object, until the contrary appears. Hammer v. Mining Co. 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964, 16 Morr. Min. Rep. 125, 132. And nothing is shown to the contrary. The sufficiency of the description is not attacked upon any other ground.

What we have said of the Bell claim is equally true of the White Eagle claim. * * *

They say that the notices of the location of these claims were not recorded within 30 days. The record shows that they were recorded before any adverse rights to the same ground were acquired. This is sufficient. No damage was done by the failure, and no one can complain that it was not done at an earlier day. Faxon v. Barnard (C. C.) 2 McCrary, 44, 4 Fed. 702, 9 Morr. Min. Rep. 515; Preston v. Hunter, 15 C. C. A. 148, 67 Fed. 996; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 15 Morr. Min. Rep. 329. * * *

It follows that the mining claims of the appellees, so far as they conflict with that of appellant as amended, should have been canceled by the trial court.

It is therefore ordered that the decree appealed from be reversed, and that this cause be remanded, with instructions to the court to enter a decree in accordance with this opinion.

BRAMLETT ET AL. v. FLICK ET AL.

1899. SUPREME COURT OF MONTANA. 23 Mont. 95, 57 Pac. 869.

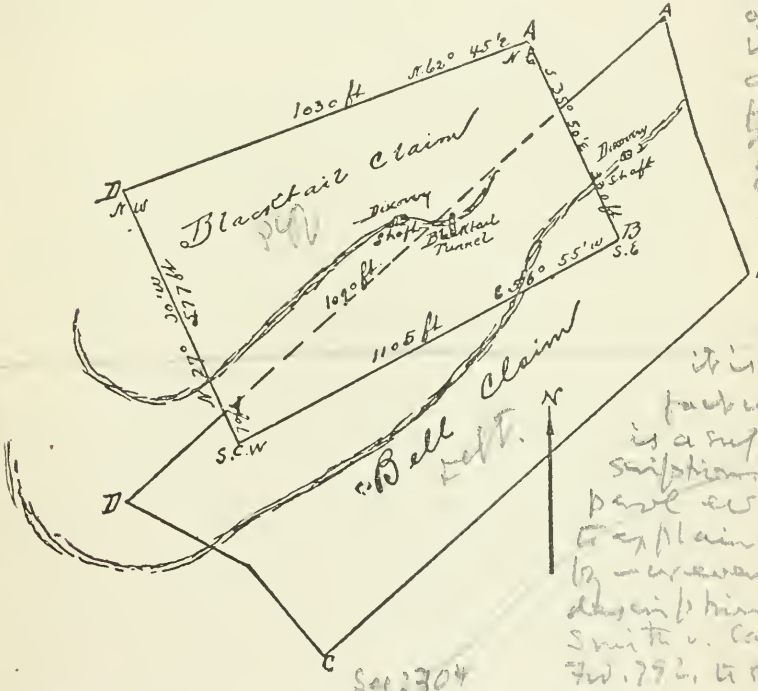
ACTION by J. H. Bramlett and others against John J. Flick and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

BRANTLY, C. J.[41]—In this action the plaintiffs seek to recover possession from defendants of a portion of the surface ground of the Blacktail lode claim, situate in Missoula (now Flathead) county. * * * The defendants, after denying the allegations in the complaint, set up title, right of possession, and possession, in themselves, under a location called the "Bell Lode Claim," alleged to have been made by them prior to that of plaintiffs. * * * The trial in the court below resulted in a verdict and judgment for the plaintiffs.

[41] Parts of the opinion are omitted.

The case comes here, on appeal from the judgment and an order overruling defendants' motion for a new trial.

1. The plaintiffs first produced evidence of what plaintiff Bramlett, who made the location of the Blacktail claim, did at the time of the location, in the way of making a discovery, posting his notice, and marking the boundaries of the claim. His evidence was supplemented by that of A. L. Jaqueth, a mining engineer, who had made a survey of both claims a few days before the hearing. As an exhibit to his statement, there was introduced in evidence a plat or diagram made by him from this survey, showing the relative positions of both claims, the courses and extent of their boundary lines, and the area in conflict. For illustration, and for convenience for reference, this diagram is inserted here:



Thereupon, over the objection of the defendants, the court admitted in evidence a copy of the notice of location of the Blacktail claim, filed for record on August 1, 1892. The ground of the objection was that it is incompetent, immaterial, and irrelevant, in that it contains no such description of the claim, with reference to natural objects or permanent monuments, as will identify the claim, and that the evidence up to that point showed that the claim is not correctly

described in the notice. The notice, after stating that the plaintiffs' claim extends 750 feet easterly and westerly from the discovery shaft upon the lode, and 300 feet on either side of the center or middle thereof, proceeds: "This lode is situated in an unorganized mining district in the county of Missoula and state of Montana, on a branch of Foundation Fisher creek, about six miles N. W. of where Thompson Falls crosses same. The adjoining claims are none, the Golden Eagle being about one mile S. E. from the Blacktail. The exterior boundaries of this location are distinctly marked by posts or monuments at each corner of the claim, so that its boundaries can be readily traced, viz.: Beginning at N. E. corner post, marked 'A,' and running from thence six hundred feet in a southerly direction to S. E. corner post, marked 'B'; from thence fifteen hundred feet in a westerly direction to S. W. corner post, marked 'C'; from thence six hundred feet in a northerly direction to N. W. corner post marked 'D'; and from thence fifteen hundred feet, in an easterly direction, back to post A, place of beginning."

The evidence of plaintiff Bramlett tended to show that * * * there is no such stream as Foundation Fisher creek, but that Foundation is a flat down below on the main or West Fisher creek, where the Thompson Falls trail crosses West Fisher creek, and from which the trail up to Bramlett creek and the Blacktail country leads; that the Blacktail claim is in fact located on West Fisher creek, and not on a branch of it; that at the time the location was made he supposed it was on a branch of the West Fisher, but that it is upon the main stream; * * * and that the plat introduced in evidence is a fairly correct representation of the claims, and their relative positions. * * *

The reference in the notice to Thompson Falls crossing and Foundation Fisher creek certainly gives no aid in identifying the claim, in view of Bramlett's statement that no such place exists. But this reference may be omitted entirely, and still enough be left in the notice, by way of reference to the other objects, to go to a jury, under the evidence applying the other objects mentioned to the locality surrounding the claim, and identifying the monuments upon the claim itself. Lindl. Mines, § 383; Flavin v. Mattingly, 8 Mont. 242, 19 Pac. 384; Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302; Hoffman v. Beecher, 12 Mont. 489, 31 Pac. 92; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728; Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713; Brady v. Husby, 21 Nev. 453, 33 Pac. 801. "It is not for the court to say, by merely looking at a record or declaratory statement, what are or what are not permanent objects or monuments. That is a matter of proof. A stake or a stone of the proper size, and properly marked, may be a permanent monument. A declaratory statement or record thereof, with a reference to permanent stakes or monuments, which did not exist as a fact on the ground, would not be good, while a defective description in the rec-

ord or declaratory statement might be cured if the stakes or monuments on the ground identified the claim." Russell v. Chumasero, supra. The reference to the Golden Eagle claim is definite enough to allow the notice to be submitted to the jury.[42] * * * The fact that the Golden Eagle claim had been located by Bramlett himself on the 17th of the previous month did not necessarily raise a presumption that it was not well known at the time of the location of the Blacktail. In the absence of proof to the contrary, the presumption attached that it was well known. Hammer v. Milling Co., 130 U. S. 291, 9 Sup. Ct. 548; Id., 6 Mont. 53, 8 Pac. 153; Book v. Mining Co., 58 Fed. 106. It is fair to suppose that such was the case, since it appears from the proof that it was among the first locations made in that part of the country, and that the miners going up into that section passed up and down Bramlett creek near where it was located. At any rate, the question was for the jury. Dillon v. Bayliss, 11 Mont. 171, 27 Pac. 725; Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037, and the other authorities cited. Even upon the presumption that this claim was not well known, still there is reference to marked stakes and trees upon the Blacktail claim itself, which the jury, under the authority of the cases cited, and under the proof so far given, might find to be permanent monuments. * * * The defendants contend that the five posts put upon the claim by Bramlett do not mark the boundaries sufficiently. But, under the authorities already cited, this was for the jury, and not for the court, to say, after hearing the proof. * * *

5. With the single exception of the particulars just mentioned, the rulings of the trial court upon the admission and exclusion of evidence were correct, so far as our attention has been called to them. In instructing the jury, however, the court adopted an erroneous view of the law touching the rights of defendants under the Bell location. The evidence introduced by defendants tended to establish the following:

Defendant Flick went alone upon the ground covered by the Bell claim on July 8, 1892,—four days before Bramlett went there. He was without tools, but went over the ground to see if he could find anything. At the point marked on the plat "Discovery Shaft," he found a lead cropping out of quartz in place, bearing gold. After examining the lead, which he could follow along by its croppings, he cleaned off the surface of a tree standing at the discovery point, and wrote upon it, in plain view:

"The Bell Claim. Located July 8th, 1892. I claim 1,500 feet in length on this lead, with twenty days for prospecting. [Signed] J. J. Flick."

[42] "In the record of the Dutchman lode, not only were the stakes of the claim called for, but the call from post No. 5 to post No. 6 was for a line 'joining with the southwesterly end line of the Toronto' mine. This was a reference to a permanent monument sufficient to identify the claim." Marshall, District Judge, in Smith v. Newell, 86 Fed. 56, 58-59.

Thereupon, after prospecting along the lead for a while, he went away to look for feed for his horses. Having found none, the following days until the 14th were spent in looking for a camping place where it could be had. He returned to the claim on the 14th in company with one Shaughenessy. They prospected on the claim and in its vicinity on that and the following day. On the 16th, after prospecting over the ground again with Shaughenessy, he proceeded to complete the location by putting up four corner and two end stakes, beginning at the east end center stake. He put up this and the northeast and southeast corners, blazing along the line as he went. He then returned to the discovery, and blazed along through on the outcrop to the west end, where he put up two corner stakes and a center stake, blazing out the lines. The stakes were made by cutting off trees four or five feet from the ground and squaring the stumps, except at the northwest corner, where he found a stump 20 feet high, which he squared as it stood. All of these monuments were marked, "Northeast corner of the Bell claim," "East end center stake of the Bell claim," etc. The distances and directions were estimated; the intention being to locate 100 feet easterly and 1,400 feet westerly from the discovery, and 300 feet on either side. A notice was posted at the discovery, substantially the same as the declaratory statement filed for record. This declaratory statement was subsequently prepared by a notary and left with him for record, but was not recorded until August 2, 1892. A copy of this was introduced in evidence. No objection was made as to its sufficiency in substance and form. It is not necessary to note it, further than to mention the fact that it contains the statement that said quartz lode was discovered on July 8, 1892. Other evidence tended to establish the good faith of Flick in completing his location; claiming that his right dated from July 8th, the time at which he made his discovery. Defendant Rockefeller was joined as one of the locators when the declaratory statement was made out.

Defendants' contention at the trial was that, Flick having made his discovery and posted his notice upon the ground on the 8th of July, their claim thereto was superior to that of plaintiffs, that this act on the part of Flick withdrew the ground which was claimed in his notice from exploration by others, and that, plaintiffs having made their location within the 20 days during which the ground was not open to location, their location was void, as to the conflicting area, and they acquired no right thereto, notwithstanding defendants failed to make their record within the 20 days. The court entertained a different view of the law, and proceeded upon the theory that, inasmuch as the plaintiffs made their location and recorded their declaration before the defendants did, they acquired a right to the conflicting area, to the exclusion of defendants. We quote the fourth paragraph of the charge, as illustrating the view the court held, and the theory upon which the case was submitted to the jury:

"You are instructed that if you find from the evidence that the defendants discovered the Bell lode or claim on the 8th day of July, 1892, before they had a valid or could have had a valid and subsisting right to said lode or claim, as against any person who had acquired an adverse right thereto, the defendants must have distinctly marked the location on the ground, so that its boundaries could be readily traced, and made and filed in the office of the county clerk and recorder in the county where such claim was situated an affidavit of the location thereof. If the defendants failed to do any one of these things, then, as against the plaintiffs, if the plaintiffs had made a valid location of the same, or any portion of the same ground, by discovery and location and recording, between the said 8th day of July, 1892, and the 2d day of August, 1892, the plaintiffs' right to the land in controversy would be valid, and a better right, and you will find for the plaintiffs."

Under the court's view of the law, as stated here, the jury could not have found for the defendants, in any event, unless they found Bramlett's location bad; for there is no controversy but that Bramlett finished whatever he did in the way of making his location on the 12th, or that he filed his statement for record on the twentieth day thereafter. And although the defendant Flick made his discovery and posted his notice on the 8th, still this gave him no rights at all, if he did not finish his location within the 20 days, and get his notice on record, no matter what were his intentions, or whether he was acting in good faith or not.

The question presented is not without difficulty, but we think the result of the decisions of the courts upon similar controversies logically leads to the conclusion that, if Flick actually posted the notice in plain view upon the exposed lead, as claimed by him, on July 8th, and thereafter during the 20 days intended in good faith to secure his claim by completing his location, no failure on his part to make such a location and proper record within the 20 days would inure to the benefit of plaintiffs. In Doe v. Mining Co., 70 Fed. 455 (a similar case, decided in 1895), it was held that the discoverer of a mineral vein should have a reasonable time after his discovery to complete his location; the length of time depending upon the situation of the ground, its character, the means of marking, the boundaries, and the abilities of the discoverer to ascertain the course or strike of the vein. The court held this to be the rule in the absence of local rules and regulations fixing the time within which the location might be completed. In this case 20 days were held to be reasonable. The supreme court of Nevada announces the same rule. Gleeson v. Mining Co., 13 Nev. 442. Wherever there are statutory provisions fixing the time within which, after discovery, the prescribed work necessary to a valid location must be done in order to secure the claim, it is held that the discoverer has the full time provided in the statute to complete it. Lindl. Mines, § 339; Omar v. Sopar, 11 Colo. 380, 18 Pac.

443; Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560; Marshall v. Manufacturing Co., 1 S. D. 350, 47 N. W. 290; Sanders v. Noble, supra. Under our statute now in force (Pol. Code 1895, §§ 3610–3612), at the time of discovery a notice must be posted at the point of discovery, and it is provided therein what this notice shall contain. The statutes of Colorado and South Dakota contain similar provisions. In Sanders v. Noble, supra, following the authorities cited, this court held that, upon the posting of the notice at the discovery in compliance with the provisions of the statute, the prospector not only has the full 90 days in which to do the work necessary, but that in marking his boundaries after the work is done he may also swing his claim so as to make it cover the lead to the extent claimed, to the exclusion of others who have sought in the meantime to occupy ground within the possible limits of the claim. Our statute of 1887, under which the locations involved here were made, contained no provision requiring a notice to be posted, but it allowed 20 days in which to complete the location and make the necessary record. Comp. St. div. 5, § 1477. It therefore seems to be the inevitable conclusion from the authorities that the defendant Flick, if he posted his notice in good faith, in plain view, with the intention to complete his location within the prescribed 20 days, after prospecting sufficiently to enable him to determine the course or strike of the vein, thereby acquired a right to all the ground along the lead legitimately covered by his notice, to the exclusion of any person endeavoring to locate any part of it by means of a junior discovery.

Recurring now to the notice posted, the amount claimed is simply 1,500 feet along the lead; nothing being said as to the direction in which this was to be measured. In Erhardt v. Boaro, supra, a similar notice was considered by the supreme court of the United States. In commenting upon it, Mr. Justice Field said:

"The written notice posted on the stake at the point of discovery * * * declares that they [the locators] claim fifteen hundred feet on the 'lode, vein, or deposit.' It thus informed all persons subsequently seeking to excavate and open the lode or vein that the locators claimed the whole extent along its course which the law permitted them to take. It is, indeed, indefinite, in not stating the number of feet claimed on each side of the discovery point, and must therefore be limited to an equal number on each side; that is to seven hundred and fifty feet on the course of the lode or vein in each direction from that point. To that extent, as a notice of discovery and original location, it is sufficient."

In posting the notice he did upon the lead, we are of the opinion that Flick thereby established a right for the statutory period of 20 days to 1,500 feet along the lead, but that he was limited in this right to 750 feet on either side of the point of discovery. The fact that in making the location thereafter he included within his boundaries ground not legitimately covered by his notice, if this was done in

good faith, as the result of ignorance or inadvertence merely, would not invalidate his claim, in so far as it includes what was legitimately covered by the notice. In no event would any error or misprision on his part in endeavoring in good faith to complete his location inure to the benefit of the plaintiffs under their location, made on July 12th, as to any ground covered by it which comes within the limits embraced by Flick's notice. To the extent, then, of 750 feet along the lead easterly and westerly from the discovery on the Bell claim, the ground was not open to exploration during 20 days after July 8th. In so far, therefore, as any of this ground is covered by the Blacktail claim, the latter should be held invalid, provided Flick's good faith in posting his notice is established by the proof. The instructions of the court on this branch of the case, as illustrated by the paragraph quoted, were therefore erroneous and prejudicial to the defendants. They are therefore entitled to a new trial upon the lines herein indicated. * * *

Let the judgment and order appealed from be reversed, and the cause be remanded, with directions to grant defendants a new trial. Reversed and remanded.

TALMADGE ET AL. v. ST. JOHN ET AL.

1900. SUPREME COURT OF CALIFORNIA. 129 Cal. 430, 62 Pac. 79.

ACTION by W. S. Talmadge and others against A. C. St. John and others for the possession of certain mineral lands and for an injunction. There was a judgment for plaintiffs, and from an order granting defendants a new trial, plaintiffs appeal. Affirmed.

HENSHAW, J.[43]—* * * The second contention against the validity of defendants' notice is that the description is inadequate, and that the law requires that the notice shall contain not only a description of the exterior boundaries as marked upon the ground, but also such a description as will, in addition, identify the claim by reference to some natural object or permanent monument. The description in question locates the claim as "commencing at a monument at the center of the West end line thence running Northerly 300 feet to a stone monument at the N. W. corner thence 1500 feet Easterly to a stone monument being the N. E. corner thence Southerly 300 feet to a stone monument, being the center of the East end line thence Southerly 300 feet to a stone monument being the S. E. corner thence Westerly 1500 feet to a stone monument being the S. W. corner thence Northerly 300 feet to the point of beginning." As is said in Mining Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886: "The object of any notice at all being to guide a subsequent locator and af-

[43] Part of the opinion is omitted.

ford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably should be held a good notice. Great injustice would follow if years after a miner had located a claim, and taken possession and worked upon it in good faith, his notice of location were to be subjected to any very nice criticism."

In this notice the exterior boundaries are described and the corners of the claim fixed by reference to permanent stone monuments. We do not think that, in the particular matter under consideration, the statute of this state requires more than is required by the Revised Statutes of the United States. Both laws require a description by reference to some natural object or permanent monument, such as will identify the claim. Touching this requirement, Judge Sawyer, in the North Noonday Case, 6 Sawy. 299, 1 Fed. 522, says: "The natural objects or permanent objects here referred to are not required to be on the ground located, although they may be, and the natural object may consist of any fixed natural object, and such permanent monument may consist of a permanent post or stake firmly planted in the ground, or in a shaft sunk in the ground." The stone monuments referred to in this notice were certainly within the interpretation of the statute thus given, and universally followed.

Moreover, when the plaintiffs went upon this mining ground they were confronted with ample evidence touching its occupancy and prior location. The tent, bedding, and tools of the defendants were there. Jennings, an employé, was holding possession for them. The monuments erected by defendants could have been seen, and should have been seen, and in fact were seen. As was said by this court, under a similar state of facts, in Newbill v. Whitfield, 63 Cal. 81: "At all events, when the defendants went on the ground on the 16th and 17th days of July, 1881, they found, or could have found if they had looked, the monuments—eight in number—erected by Wallace, Parks, and Ferrell on the 12th of April, with the notices above indicated. Those boundaries included the premises in controversy. From them the defendants saw, or ought to have seen, that the ground was appropriated by others, and was not open to location by them." The order appealed from is therefore affirmed.[44]

[44] Where no other monuments are referred to than the claim's own corners, the accuracy of their description may become of especial importance. In Pollard v. Shively, 5 Colo. 309, it was held that a call for a "post" was not answered by showing that a "stump" was there and was meant. Contra. Bonanza Consol. Min. Co. v. Golden Head Min. Co., 29 Utah 159, 80 Pac. 736. So it has been held that a call for a shaft is not met by showing an adit. Duncan v. Eagle Rock Gold Min. & Reduction Co., 48 Colo. 569, 111 Pac. 588, 592, where White, J., for the court said: "When the location certificate of a claim in the vicinity of territory which a prospector desires to locate calls for a particular monument, to-wit, a shaft, an adit, a cut, or 'a post four

(b) *Amendments of Record.*

TONOPAH & SALT LAKE MIN. CO. v. TONOPAH MIN. CO. OF NEVADA.

1903. CIRCUIT COURT, D. NEVADA. 62 C. C. A. 685, 129 Fed. 1007.

HAWLEY, DISTRICT JUDGE.[45]—This is a suit or proceeding brought under the provisions of section 2326, Rev. St. [U. S. Comp. St. 1901, p. 1430], upon an adverse claim and protest filed in the United States land office at Carson, Nev., against the application of the defendant for a patent to consolidated claim No. 2,012, embracing eight mining claims, for the purpose of determining which of the parties has the better right to the mining ground in controversy. The right and interest of the complainant to the land is based upon a location of a mining claim situate in Tonopah mining district, Nye county, Nev., known and designated as the "Pyramid"; and the right and interest of the defendant to the area in conflict is based upon the location of the mining claim known and designated as the "Valley View." * * *

The eight claims in the application for a patent embrace the original Butler group of mining claims, discovered and located by J. L. Butler, and were the first locations made in what is now known as the "Tonopah Mining District." * * *

It will be noticed that the original location of the Valley View, the certificate of location, and the additional and amended certificate of location were long prior in point of time to the location of the Pyramid. The right of the original locators to change their original location, so long as such change does not interfere with the existing rights of others acquired previous to such change, is unquestioned. * * *

The statute of this state approved March 16, 1897 (Laws Nev. 1897, p. 103, c. 89; Comp. Laws 1900, § 210), gives 90 days after the date of posting the location notice in which to file a certificate of location, which must be recorded, and provides what it shall contain. In another section it provides for the filing of an additional or amended certificate of location. This section reads as follows:

> If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was de-

inches square, set two feet in the ground,' the prospector has a right to look for, and to demand, the particular monument specified, and his rights cannot be jeopardized by proof of some other monument not designated."

But the Utah case above cited and the cases of Hansen v. Fletcher, 10 Utah 266, 37 Pac. 480, and Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, which hold that where a call is for a stake a tree can be shown, and vice versa, so long as subsequent prospectors are not actually misled, would seem to be more in accord with the spirit of the mining laws.

[45] Parts of the opinion are omitted.

fective, erroneous, or that the requirements of the law had not been complied with before filing; or shall be desirous of changing his surface boundaries or of taking in any part of an overlapping claim which has been abandoned; or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate, subject to the provisions of this act: provided, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or the record thereof shall preclude the claimant or claimants from proving any such titles as he or they may have held under previous location. Cutting's Comp. Laws 1897, §§ 210, 213.

The courts, previous to the enactment of statutes of this character, held that the locator, after posting his notice of location, should be allowed "a reasonable time" within which to perfect his location. 1 Snyder on Mines, § 205, and authorities there cited; Doe v. Waterloo (C. C.) 55 Fed. 11, 15; Id., 70 Fed. 455, 457, 458, 17 C. C. A. 190; Gleeson v. Martin White M. Co., 13 Nev. 442, 460. One of the objects of the state statute was evidently to make this time certain and definite. The Legislature of this state, in enacting this statute, recognized that difficulties are always liable to present themselves to the enterprising prospector, especially in districts where no actual development has been made, to determine with accuracy and precision the course of the ledge which he has discovered, its apex and width. The statute gives to the locator of the lode 90 days to take such bearings as he can to guide him in marking and defining his boundaries, and further provides that if he discovers that he has made mistakes, has taken up more or less ground than he is entitled to, or from any cause that his location is defective or erroneous, he may relocate or change his boundaries, provided the same "does not interfere with the existing rights of others." It gives the original locator the full measure of the rights which the mining laws permit him to acquire as the reward of his energy in discovering the mineral lode or vein. It has always been the policy of the government to encourage its citizens in searching for, discovering, and developing the mineral resources of the country; and this policy can always be best subserved by permitting the discoverer to rectify and readjust his lines, whenever from any cause he desires to do so, provided he does not interfere with or impair "the intervening rights of others."[45a] There is no statute, law, rule, or regulation, state or national, which denies this right. The

[45a] "An owner may amend his survey * * * to correct diverging end lines. Doe v. Sanger, 83 Cal. 203, 23 Pac. 365. The right so to amend is undeniable, but we apprehend, where rights have become vested in the underlie, that such amended end lines would not divest such rights any more than amended surface lines could divest the rights of an intervening overlap. We can see no difference between an estate vested in an extralateral portion of a lode and an estate vested in the surface of the same."—Morrison's Mining Rights, 14 ed., 202, 203.

amended certificate of location, when made, becomes the completed location of the discoverer, and is just as valid as if it had been made in the first instance. It necessarily follows that parties coming upon the mining claim and ground described in the amended certificate of location, subsequent to the perfection of such amended location in compliance with the mining laws, can acquire no rights, because they have not been injured, and have no right to complain.

The amended certificate of location in the present case contains the names of several persons, as locators, who were shown by the evidence to have legally acquired interests therein after the original location had been made, and before the amended certificate was prepared or filed. The rule is that, where the second or amended notice or certificate of location contains names other than those set forth in the original, it cannot be taken advantage of by other parties. It may be treated as an original notice as to the persons whose names do not appear on the first, and as a supplemental or amended notice as to those whose names appear on both. Lind. on Mines (2d Ed.) § 398; Thompson v. Spray, 72 Cal. 528, 529, 14 Pac. 182. The law does not require that the object or purpose of making the amended certificate shall be specified therein. A general statement that it is made to cure errors or defects will be sufficient, the general rule upon this subject being that the filing of such certificate is effectual for all the purposes enumerated in the statute, whether such purposes are mentioned in the certificate or not. Lind. on Mines (2d. Ed.) § 398; Johnson v. Young, 18 Colo. 625, 629, 34 Pac. 173.

One of the reasons testified to at the trial was that the original north side line of the Valley View took in the Silver Top discovery shaft, and also interfered with other previous locations. Another was to straighten up the south line. * * * The location of the Valley View under the amended certificate of location was and is valid, as against the Pyramid location, the owner of which had not at that time acquired any right whatever to the ground in controversy. * * *

The broad contention of complainant, as made in all the three cases, is that the locators of the Valley View must be held to the lines of its original location; that they acquired no new rights in their amended location, because it included ground not within its original boundaries, and they did not make any relocation of such new territory, and did no annual assessment work thereon, and did not make any discovery of mineral therein, and were never in the actual possession thereof. The law does not require that such things should be done in order to make the claim, as described in the amended certificate of location, valid to the full extent of the boundaries therein described, as against any subsequent locator of any portion of said ground. If such is not the true intent and meaning of the state statute, it has no meaning, and ought never to have been

passed. The object of the state statute has already been fully discussed. It was to protect, not to deceive, the locator. It was to enable the miner to make good the developments he had made—the assessment work he had done under his original location—and at the same time include other ground not embraced in his original notice or first certificate of location, so as to make his lines conform to the directions which his labor, time, and expense had indicated to him as the true course of the lode. In making the additional amended notice, it was not necessary for him to take physical possession of the additional ground, sink new shafts, or make any new discoveries of mineral.[45b] * * *

Let a decree be entered in accordance with the views herein expressed in favor of the defendant, and for its costs.

BERGQUIST ET AL. v. WEST VIRGINIA-WYOMING COPPER CO.

1910. SUPREME COURT OF WYOMING. 18 Wyo. 234, 106 Pac. 673.

ACTION by C. B. Bergquist and another against the West Virginia-Wyoming Copper Company. Judgment for defendant, and plaintiffs bring error. Judgment affirmed.

POTTER, C. J.[46]—This is an action for the possession of certain mining ground situated in the Upper Platte and Battle Lake mining district, in Carbon county in this state, and is brought in support of an adverse claim filed by the plaintiffs upon the application of the defendant for a patent to certain claims embracing the ground in controversy. Upon a trial in the district court, without a jury, there was a general finding in favor of the defendant and against the plaintiffs, and a judgment to the effect that the defendant is entitled to the possession of the premises by virtue of a full compliance with the statutes relating to the discovery and location of mining claims. The plaintiffs bring the case here on error.

The plaintiffs claim under a location of the ground by them and one M. F. Cannon, as the "Merry Christmas" lode mining claim, on December 25, 1906, and a deed by Cannon subsequently conveying his interest to the plaintiff Bergquist. The defendant's claim to possession is based upon locations by its grantors of three lode mining claims named, respectively, the "Modoc," "Little Wonder," and "Little Joe." The location of the Modoc and Little Wonder and

[45b] But see, as to placer claims, Garden Gulch Bar Placer, 38 Land Dec. Dep. Int. 28; Chas. H. Head, 40 Land Dec. Dep. Int. 135.

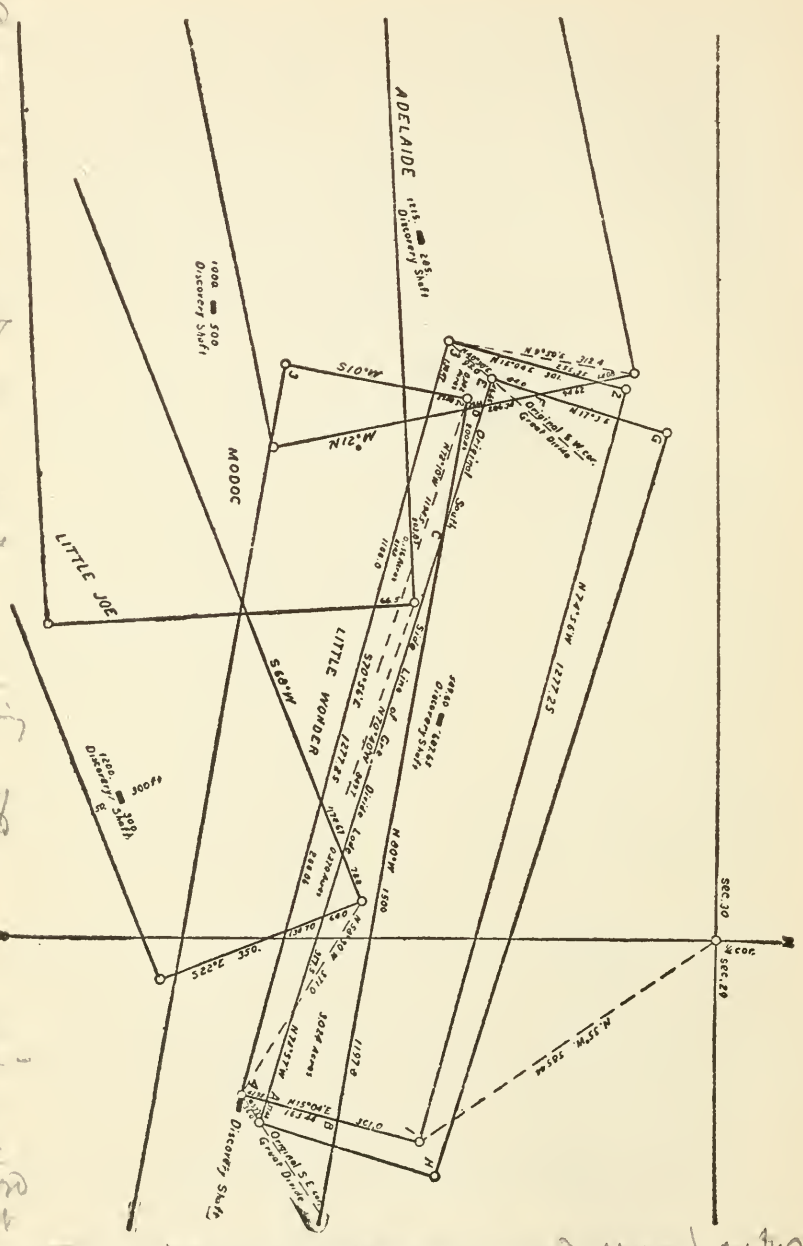
[46] Parts of the opinion and all of the concurring opinion of Scott, J., are omitted.

the original location of the Little Joe occurred prior to 1900; the Modoc, July 21, 1899, the Little Wonder, August 17, 1898, and the Little Joe (as originally located) September 16, 1897. The record does not disclose any adverse or conflicting claims prior to December 25, 1906, on which date it is alleged that the Merry Christmas was located, though it is claimed on the part of the defendant that a second location of the Little Joe was made on December 24, 1906, to protect the rights of the owners of that claim against any attempt by others with adverse interests to relocate the ground. On January 9, 1907, amended location certificates of the Modoc, Little Wonder, and original Little Joe were recorded, that of the Modoc and Little Joe being dated June 14, 1900, and of the Little Wonder June 13, 1900; they having been prepared in June, 1900, to agree with a survey of the claims made at that time. On April 12, 1907, the defendant, to whom the three claims, among others, had in the meantime been conveyed, filed another amended location certificate for each claim. The amended certificates appear to have been filed to more definitely or correctly define the claim as originally located, and not to change the surface boundaries.

The conflict relates principally to the Merry Christmas and Little Joe; it appearing that in locating the former claim it was intended to cover substantially the ground included within the latter, upon the supposition that the same had been forfeited and was open to relocation. The side lines of the Merry Christmas run parallel to and within a few feet of the corresponding lines of the Little Joe, and the claim extends a short distance northeasterly beyond the northeast end line of the Little Joe into the territory of the Little Wonder, leaving a small strip across the southwest end of the Little Joe, and a narrow strip along and, as we understand, within each of its side lines, untouched by the boundaries of the Merry Christmas location. With this explanation it will be sufficient, as showing the relative positions of the several claims mentioned, to refer to the map published with the opinion of this court in the case of Slothower v. Hunter et al., 15 Wyo. 189, 195, 88 Pac. 36.[47]

From the evidence it appears that the original discovery upon the Little Joe was made at the time of its location in 1897. That claim, with the Little Wonder and others, was involved in the case of Slothower v. Hunter et al., supra, wherein this court held that the original recorded certificate of location of the Little Joe was void, in that it failed to give the length of the claim along the vein each way, measured from the center of the discovery shaft, as required by the statute of this state. Thereupon the attorney representing the opposing interests advised or suggested the location of the ground by the plaintiffs, upon the theory that the decision in the case aforesaid in effect annulled all rights under the Little Joe location, leav-

[47] The map from Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, is as follows:


ADELAIDE
Discovery 1878 — 295 Shaft
Discovery 1880 — 500 Shaft
MOOSE
LITTLE JOE
LITTLE WONDER
Discovery 1880 — 400 Shaft
Discovery 1878 — 300 Shaft
Discovery Shaft
Original Discovery
Original S.E. Corner
Original S.W. Corner
Original Corner
Original Corner
Original

ing the ground unappropriated. A. M. Woodruff and F. E. Hunter, the latter being an original locator of the Little Joe, having learned of the decision in the Slothower Case, and that others were proposing to locate the ground, at once took steps to protect the Little Joe location, and to that end, on December 24, 1906, Woodruff prepared as of that date a notice of location of the Little Joe claim, to be posted in his name, and gave it to Hunter for that purpose. Hunter also signed the notice, and immediately went to the claim, reaching the same during the night, and thereupon, early in the morning of December 25th, placed the notice in the ridge log of the Little Joe shafthouse, and wrote another similar notice on a slab, signing his own name and Woodruff's as locators, and placed it on top of the shaft. Woodruff was one of the locators of the Modoc and the Little Wonder claims adjacent to the Little Joe, and Hunter was also one of the locators of those claims. About 11 o'clock in the forenoon, after Hunter had posted his notices as foresaid, the plaintiff Cothern and M. F. Cannon arrived upon the ground, and posted inside the shafthouse of the original Little Joe claim a notice of the location of the Merry Christmas lode, the names of the plaintiffs Bergquist and Cothern and M. F. Cannon being signed as locators; the said notice being posted on a slab tacked upon one of the logs of the shafthouse above the ground. Cothern and Cannon testified that when they arrived at the claim, they noticed tracks in the snow, and thereby understood that some one had recently been there, and that they then saw and read the notice of Woodruff and Hunter upon the slab.

Considerable work had been done upon the original Little Joe, the shaft having been sunk to a depth of 50 or 60 feet, and the evidence shows that the claim had never been voluntarily abandoned. Hunter was one of the original discoverers and locators, and he and Woodruff did the work of sinking the shaft, and each knew, at the time of posting their notice, of the existence on the claim, and at the point where the notice was posted, of mineral-bearing rock in place. Woodruff was on the claim on December 26 or 27, 1906, and early in January, 1907, he caused a shaft to be sunk for the new Little Joe location, at a point about 60 feet easterly from the old shaft, and it was completed to the requisite depth of 10 feet on January 6, 1907, disclosing mineral-bearing rock in place. On January 29, 1907, a location certificate of the new Little Joe location signed by Woodruff was recorded.

After the completion of the new Little Joe shaft, and probably on the following day, Cothern commenced the digging of a shaft for the Merry Christmas about fifty feet easterly from the old Little Joe shaft, and completed the same to the requisite depth disclosing mineral-bearing rock in place, about February 1, 1907. Thereafter, and before the expiration of 60 days from the date of posting the Merry Christmas notice, the locators thereof caused the boundaries

to be surveyed, and an attempt was made to mark the boundaries by stakes, but the stakes were all driven in snow, and it seems that some of them were not driven through the snow into the ground. On February 21, 1907, the locators of the Merry Christmas lode recorded a location certificate dated February 18, 1907, giving the date of location as February 14, 1907.

On January 29, 1907, all the locators of the Modoc, Little Wonder, and Little Joe, including A. M. Woodruff, joined in a deed conveying said claims, with others, to the Witz Investment Company, a corporation; and on February 2, 1907, the Witz Investment Company conveyed the same mining claims to the defendant herein. The deputy mineral surveyor, who made the survey of said three claims in June, 1900, and prepared the amended certificates of that year, and who also surveyed for the plaintiffs the Merry Christmas lode as located, and made the map introduced in evidence by the plaintiffs to show the situation of the respective claims, testified that when he made the survey in 1900 the boundary stakes and monuments of the three claims of the defendant aforesaid were all in place, and there is nothing in the record to show or indicate that any of them were afterwards removed or displaced.

1. It is maintained on behalf of the defendant that proof of the validity of either location of the Little Joe is sufficient to sustain its right to that claim, since all the locators under the respective locations joined in the deed to defendant's grantor. * * *

The contention that the deed from Hunter, Woodruff, and others to the Witz Investment Company conveys only the rights of the grantors under the original location of the Little Joe is not sustained by a proper construction of that instrument or the facts of the transfer. It is a warranty deed, containing covenants of seisin and right to convey, against incumbrances, of quiet enjoyment and of warranty, "excepting the provisions, reservations, and limitations contained in the patent of the United States to be issued for said survey lots," referring, no doubt, by the use of the words "survey lots" to the ground embraced in the claims as finally surveyed. The premises conveyed are described as certain adjacent lode mining claims, the same being named and including the "Little Joe," as the same are recorded in the records of Carbon county in certain books and at certain pages specified in the deed. And it seems to be supposed that because the records referred to, so far as the Little Joe is concerned, cover only the certificate or certificates of the original location of the claim, no right was acquired throught the deed under the second location. But it is clear that the reference to the recorded certificates was for the purpose of identifying the boundaries and situation of the respective claims, and not the designation of a particular location under which the mineral land had been appropriated. As the boundaries of the Little Joe under each location are exactly the same, as shown by the location certificates, the

description fits the claim under either location. The grantee was given possession of the claim and the territory covered by it, and it was clearly intended to convey all the interest of the grantors in the claim, however and when ever located.

The Modoc, Little Wonder, Little Joe, and other adjoining claims are mentioned in the evidence as constituting a group of claims benefited by development work done in common, and, inferentially at least, it appears that the respective locators, if not jointly interested in each claim, had a common interest of some character in maintaining and preserving the several claims. If the new location of the Little Joe should be found invalid for any reason, the attempt thereby to relocate would not constitute an abandonment or forfeiture of the former location, even though attempted in the interest of the original locators. Weill v. Lucerne Min. Co., 11 Nev. 200; Temescal, etc., Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010. The title of the locators under either location passed by conveyance to the defendant, and it is therefore not material as against the plaintiffs whether the proper source of the defendant's title is to be found in the original or new location, provided either is good, entitling the defendant to possession. * * *

3. Without reciting in detail the evidence relating to the original location of the Little Joe, we deem it sufficient to say that it shows a valid discovery upon the claim in 1897, the sinking of discovery shaft immediately thereafter, the staking of the boundaries, and the performance each year of the annual labor and development work required by law. That an original location certificate was recorded and within the period required by law, or at least long prior to any attempt by others to relocate the ground, is to be regarded as conceded for the reasons previously stated. The amended certificate, so called, was dated, as aforesaid, June 14, 1900, recorded January 9, 1907, and signed by F. E. Hunter, R. F. Jones, and H. L. Kuydendall, presumably the original locators, or, at any rate, the then owners. It states that the claim described is the same that was originally located September 16, 1897, and that the amendment is made "without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description, or record." At the time it was recorded, all that had been done toward the location of the Merry Christmas was the posting of notice, and the commencement of work upon a discovery shaft. The shaft, however, was not completed until about February 1, 1907. The statute provides that: "Whenever it shall be apprehended by the locator, or his assigns, * * * that his or their original location certificate was defective, erroneous, or that the requirements of the law had not been complied with before the filing thereof, or shall be desirous of changing the surface boundaries of his or their original claim or location, or of taking in any part of an overlapping claim or location which has been abandoned, * * * such locator or locators, or his or their

assigns may file an additional location certificate in compliance with and subject to the provisions of this chapter: Provided, however, that such relocation shall not infringe upon the rights of others existing at the time of such relocation, and that no such relocation, or other record thereof, shall preclude the claimant from proving any such title or titles as he or they may have held under any previous location." Rev. St. 1899, § 2538.

The same statute exists in Colorado, and it has been held in that state that the section corresponding with our section 2547, to the effect that a certificate is void which does not fully contain all the requirements of section 2546, together with such other description as shall identify the lode or claim with reasonable certainty, is to be construed with the section providing for the recording of additional certificates, whereby the imperfect certificate is not to be held absolutely void, since it is made capable of amendment, whereas "a void thing is null, and not subject to amendment," and that when amended the amendment takes effect with the original as of the date of the latter. McEvoy v. Hyman (C. C.) 25 Fed. 596; Fisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109. In the case last cited Mr. Justice Goddard took the view that the proviso in relation to existing rights at the time of the recording of the additional certificate had reference only to a change of boundaries and a relocation that should take in territory not before included in the claim, and not to amendments made for other purposes, such as to cure defects in description. The other justices expressed no opinion upon the construction of the statute, but concurred in the decision on other grounds deemed sufficient to dispose of the case. There is much reason we think for the construction given the statute by Judge Goddard.[48] In Idaho, where there is a similar statute, the court agrees with Judge Goddard's construction. Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955. And Lindley seems to accept that as the rule. He says: "A reasonable latitude of amendment is allowed, of which the locator cannot be deprived because some one has attempted to relocate the ground. There is a distinction between amending an original location by reforming lines and rectifying errors based upon a prior discovery and location, and the relocation of abandoned ground." Section 398.

In a recent Colorado case it was held that, where the location certificate of a senior location had not been filed within the statutory

[48] "But in Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109, where a record contained no reference at all to a natural object or permanent monument and was not only constructively void for non-compliance with the Congressional act, but was declared void in terms by the Colorado statute, the relocation [by amended record] was held to relate back to the original record and to cut out an intervening title. The opinion in the case is peculiar in this, that it is the personal view of one judge, and both of his associates refused to concur. * * * We consider untenable the proposition that any amendment can cure a void record as against an intervening location."—Morrison's Mining Rights, 14 ed., 156.

period, but its filing preceded the filing of the certificate of a junior conflicting location, though after the performance of some of the statutory acts of locating the junior claim, the senior claim became the prior location. The court say that the court should have told the jury as a matter of law "that the filing of the location certificate of the Evening Star, though not within the statutory time, yet in advance of the filing of that of the Little Jonnie, so far as that particular step in locating a mining claim is concerned, constitutes the Evening Star a prior location." Washington Gold Min. & Mill. Co. v. O'Laughlin (Colo.) 105 Pac. 1092. That rule can, we believe, be correctly applied here, thereby confirming the priority of the original location of the Little Joe, through the filing of the amended certificate five weeks or more before the filing of the certificate of the Merry Christmas, with title thereunder vested in defendant; its immediate grantor having acquired and conveyed to it all the right to the ground under either location of the Little Joe. But we are not disposed to rest our determination of the case altogether upon this proposition; for if we are wrong concerning it, then without reference to it a consideration of the other facts in the case must clearly demonstrate, we think, either that no rights were at any time acquired by the location under which plaintiffs claim, or that whatever inchoate rights were acquired were completely lost through the second location of the Little Joe claim. We, therefore, proceed to consider the other questions in the case which were chiefly discussed by counsel, assuming in doing so that the ground of the Little Joe was open to relocation by reason of the stated defect in the original location certificate.

4. By reason of the prior posting of its location notice the second location of the Little Joe constituted a prior appropriation of the ground embraced within its boundaries, as against the plaintiffs, if the notice was sufficient, and the location was perfected, or sufficient location acts were performed to cut off any rights under the junior location. The fact that Hunter was one of the original discoverers and locators of the lode, and that he and Woodruff had done the work of sinking the shaft on the former claim, and each knew of the existence of mineral-bearing rock in place in that shaft, and at the point where the notice was posted, sufficiently shows a discovery to support the new location at the time of posting the notice, if the ground was open to relocation. It is, however, contended in the first place that the location notice was insufficient.

The only notice required by our statute to be posted on the claim, or by any district rule, so far as this record discloses, is that provided for in section 2548, Rev. St. 1899, which prescribes that, before the filing of the location certificate, the discoverer shall designate the location, by, among other things, "posting at the point of discovery, on the surface, a plain sign or notice, containing the name of the lode or claim, the name of the discoverer and locator, and the date of such

discovery." Section 2546 requires the discoverer, within 60 days from the date of discovery, to "cause such claim to be recorded * * * by a location certificate" containing certain facts. The posted notice provided for in section 2548 is for the purpose, as stated in the section, of designating the location of the lode, vein, or fissure discovered. The notice has no relation to the location certificate, except that it is to be posted before the filing of the latter. As observed in Lindley on Mines (2d Ed.) § 355, the requirement of our statute as to posting notice is a perpetuation of the custom that prevailed, in the early mining history of the West, of posting a notice at some point on, or in close proximity to, the discovery lode as the first step in appropriating the same, the purpose of which was to show the discoverer's intention to claim the vein to the extent described, and to warn others that it had been appropriated. In view of the object of the notice, as well under the statute as by the early custom, it is the universal rule, where neither the notice nor a copy of it is required to be recorded, that it is to be liberally construed, and its sufficiency, at least to accomplish the purpose intended, is a question of fact.

There were two notices left upon the claim to designate the second Little Joe location. One was written on paper by Woodruff, signed by Hunter and himself as locators, witnessed by one Newman, and was entitled "Location Notice." It was placed by Hunter in the ridge log in the shafthouse, and an additional notice was written by Hunter upon a slab and placed where it could more readily be seen. The contents of the first notice, omitting the hearing and signatures, were as follows: "I, the undersigned have this 24th day of December, 1906 located and claimed 1500 feet on this lead lode or mineral deposit running 400 feet in an easterly direction and 1100 feet in a westerly direction from this location notice; also 300 feet on each side of this location. Said claim shall be known as the 'Little Joe.'" The notice on the slab, as copied by McCoy, the surveyor, on February 14, 1907, when he went to the claim to survey the Merry Christmas, was as follows: "Notice. We, the undersigned, did this 24th day of Dec. locate 1500 feet of the lead vein or mineral as follows: 400 feet in an easterly direction and 1100 feet in a westerly direction from the discovery with 300 feet on each side of this location notice. This shall be known as the Little Joe." It was signed in the names of A. M. Woodruff and F. E. Hunter as locators, and by C. F. Newman as witness.

Two principal objections are urged against the sufficiency of these notices. First, that the date on the slab notice did not mention the year; and, second, that the name of the discoverer is not stated in either notice, the names of Woodruff and Hunter being signed only as locators, and there being no recital in the notice to designate them as discoverers. There is some conflict in the evidence as to whether the notice on the slab mentioned the year. Hunter states positively

that it was inserted in the notice. McCoy and other witnesses produced by the plaintiff testified that they saw the notice, and failed to find any mention of the year in the date. At least one of such witnesses admitted that it might have been there, and not easily observed because of the fact that the notice was written with a pencil on a rough slab. Whether under the general finding it might be considered that the court passed upon the conflicting evidence in favor of the defendant, or that the preponderance is so strongly against the defendant on the point as to render such a finding improbable or unsustained by the weight of the evidence, we think not very material. The notice written on paper, and placed in the ridge log, contained the complete date, and in that respect was sufficient. Further, the evidence renders it clear that the locators of the Merry Christmas were not misled as to the date of the notice, or the time when it was posted.

Under the circumstances the two notices should be considered together. The paper notice, as shown by the evidence, was stuck in the ridge log of the shafthouse to prevent its being torn by the wind. That log, it appears, was situated directly over the shaft, and only a few feet above the top of it, and the conclusion to be fairly reached upon the evidence is that the notice was not so concealed as to escape observation upon reasonable search. Although Cothern and Cannon testify that they did not see that notice on December 25th, McCoy testifies that he saw it stuck in the ridge pole of the shafthouse from a point 50 feet distant, where he was setting up his transit, when he went to the claim in February to survey the boundaries of the Merry Christmas, and called Cothern's attention to it, and read and copied it. Lindley states the rule to be that, in the absence of any specific direction in the statute or district regulation prescribing the manner of posting, any device adopted will be sufficient which would enable one seeking information in good faith to discover the existence of the notice. 1 Lindley on Mines (2d Ed.) § 356. In view of the situation we think that, had the paper notice been the only one, it was sufficiently posted.

It is unnecessary to determine whether the statute, in requiring the notice to be posted at the point of discovery, refers to the point where the lode is first discovered by the locator, or where the discovery shaft is sunk, in case the situation of the original discovery and discovery shaft are not identical, or whether either will answer the purpose of the statute. The location notice of both the second Little Joe and Merry Christmas were posted at the same place, while the discovery shaft of each claim was sunk a short distance therefrom —in the case of the Little Joe about 60 feet, and of the Merry Christmas about 50 feet. Therefore, if a proper construction of the statute, a question which we do not decide, would require the location notice to be posted at the discovery shaft as distinguished from the point where the lode was first discovered upon the claim,

there would be the same irregularity in both the Little Joe and Merry Christmas location, which, if sufficient to invalidate either claim, would invalidate both, whereupon it would follow that the amended certificate of location of the original Little Joe would take effect as recorded before the existence of the intervening rights, thereby curing the only defect suggested by this record as to that location.

Were both notices insufficient on the ground that they omitted the name of the discoverer? Counsel for the plaintiffs seems to understand the statute to indicate that the discoverer and locator may be different persons. We do not think the statute is to be so construed. In section 2546 the "discoverer" is required to record a location certificate. In the section providing for and prescribing the contents of the notice (section 2548) the "discoverer" is required to designate the location by posting the notice and performing the other specified acts. In the section prescribing the procedure for locating placer claims (section 2553, as amended, Laws 1901, c. 100) the same provisions appear; but, as to such claims, it is provided that the notice shall state, in addition to the name of the claim, date of discovery, and number of acres claimed, only the "name of the locator or locators." Again in section 2550 it is provided that the "discoverer" of any mineral lode or vein shall have the period of 60 days from date of discovery in which to sink a discovery shaft thereon. Where a discovery is made by a prospector acting for himself and others, or in the exclusive interest of others, his discovery operates to their benefit for the purpose of a location, and, within the meaning of the statute, they are discoverers entitling a location to be made in their name. Since the statute throughout suggests that a location may be made only by the discoverer, and, in the section aforesaid providing for posting notice requires that the "discoverer" shall designate the location by posting a notice containing the "name" of the "discoverer and locator," we think that clearly the words "discoverer and locator," as there used, refer to the same person, and the person signing the notice of location is to be understood as claiming discovery, and to be both discoverer and locator. Any other construction would not only be extremely technical, but, as occurs to us, without any good reason to support it. The notice itself is not evidence of a discovery; that fact must be otherwise shown. It is to be observed that the notice on the slab stated the length claimed in each direction from "discovery," thus indicating a claim of previous discovery.

The fact that the notice may in fact have been posted after midnight of the date it bears does not invalidate it, no fraud or fraudulent intent appearing, and the notice having been posted before the initiation of the conflicting or adverse claim. Nor is there any force in the objection that the date of discovery is not stated, for, under the rule of liberal construction, the statement that on the date mentioned the locators located and claimed the lode to the extent de-

scribed is to be taken and understood as the date of discovery, within the meaning of the statute, and as inserted to comply with the statute in that particular; the statement of no other date being required. A notice under a similar statute in Colorado was held sufficient which merely stated that "the undersigned claim 1,500 feet on this mineral-bearing lode, vein or deposit," and was dated and signed without specifically designating the persons signing as either locators or discoverers. Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113.

5. It is contended that the boundaries of the Little Joe under the second location were not marked as required by the statute. The evidence does not indeed show a new or independent marking of the boundaries of that location, but it does show by the location certificate that the old boundaries as staked, marked, identified, and surveyed were adopted, for that certificate conforms exactly in its description by metes and bounds to that of the amended certificate of the original Little Joe, which was prepared in 1900 according to the survey then made, and refers to and describes the same corner and side center stakes. The evidence is clear that in locating the second claim it was intended to cover the exact ground embraced in the former location, and there is no evidence that any of the boundary posts or monuments had been destroyed or removed.

Upon the authorities the adoption of the old boundaries and boundary stakes or markings was permissible. Brockbank v. Albion Min. Co., 29 Utah, 367, 81 Pac. 863; Conway v. Hart, 129 Cal. 480, 62 Pac. 44. * * *

If the location is in fact marked in the manner provided, it does not occur to us as important whether the marking has been accomplished through the process of erecting new stakes or monuments, or by adopting and using those, if any, already at the proper places, and conforming to the statutory specification.

The [state] statute, it is true, contains an express permission to adopt old boundaries only in case of the relocation of an abandoned claim. Rev. Stat. 1899, § 2552. That provision, however, is not found in the section which directs that the boundaries be marked in a particular manner, nor in a section specially regulating that subject, but in a separate section permitting and providing for the relocation of abandoned claims, and is not to be construed as excluding the right in every other case to adopt old boundaries and boundary stakes. It declares a rule even as to abandoned claims which would exist independent of statute. There was no such permissive statute in California or Utah where adoption of old boundary stakes was held competent. We are unable to observe any distinction upon principle in this respect, whether the ground is open to relocation because of the abandonment of the old location, or the nonperformance of all the location acts within the statutory period, or for any other reason, if the boundary stakes are at the disposal of the new locator; and, if

the latter may lawfully remove the old stakes, there seems to be no reason preventing him from allowing them to remain to define the same boundaries of the new location. At any rate, so long as they remain and do in fact actually represent the respective corners and other points of the new location requiring such designation, and are adopted as such, it is unreasonable to say that they do not mark the location or boundaries. * * *

It is true that there is no evidence that Woodruff expressed to any one an intention to adopt the old stakes. But his acts are as effectual as spoken words to show the fact. It appears that the new location was intended to cover the territory of the old location. The location notice indicates this, as well as the testimony of Hunter and Woodruff. The location certificate, filed for record by Woodruff a little over a month after the location notice was posted, so describes the location and claim as to leave no doubt that it refers to the same lines and corners as those of the old location. And as a part of the description the certificates under both locations show the location of the corners by reference to the same natural objects. For example, it is recited in each that: "From the N. E. corner No. 1, a 14 inch stump, 5 feet high, bears S. 70° W., 27 feet. From the S. E. corner No. 2, a 12 inch spruce tree bears N. 13° E. 15 feet." The tree thus referred to is called in one certificate a "spruce" tree, and in the other a "pine" tree. The remaining identifying objects are similarly described in both certificates, and the fact is unmistakable upon the evidence that at the time of the new location, as well as when the survey was made in June, 1900, the said corners and side center points were marked by the stakes of the former location. As the intention to perform all necessary location acts under the new location is clear, and new stakes were not erected, but the location certificate refers to and describes those already in place, it appears to the court that nothing further is needed, in the absence of contradictory evidence, to show an adoption of the old stakes. A statement by Woodruff at the time of such intention would have added little, if any, force to the evidence, though it might have explained what is apparent without it. The fact becomes, if anything, more evident when the condition of the ground at the time is considered. It was covered with snow, and at places to a depth of four or five feet, rendering the staking of the claim at that time very difficult, if not impracticable. Indeed, it appears that the locators of the Merry Christmas did not succeed in February in driving some of their stakes into the ground, in consequence of the great depth of the snow. In this respect the case is somewhat similar to the Utah case above cited. * * *

7. Having acquired all the title of the locators of the Little Joe claim under either location, it was competent for the defendant to record the additional or amended certificate of April 12, 1907, and claim thereby an original discovery made September 16, 1897. It

appears that such amended certificate as to each of the three claims of defendant was signed in its name by its attorney, who testified that he did so by virtue of a power of attorney, which had been filed in the land office. Whether there was authority for such signing or not is a matter in which the plaintiffs are in no manner concerned. But by offering the certificates in evidence and relying upon them, the defendant has shown a ratification of the act of its agent, even in the absence of original authority.

Without considering the remaining objections urged by defendant against the validity of the Merry Christmas location, we conclude, for the reasons above stated, that the evidence establishes the defendant's right of possession, and the judgment will be affirmed.

SEYMOUR v. FISHER ET AL.

(See post, p. 569, for a report of the case.)

JOHNSON v. YOUNG, ET AL.

1893. SUPREME COURT OF COLORADO. 18 Colo. 625, 34 Pac. 173.

ACTION by C. W. Young, George W. Farnham, and William Elliott against Albert A. Johnson. From a judgment for plaintiffs, defendant appeals. Reversed.

GODDARD, J.[49]—This is an action, brought upon an adverse claim, to determine the right to the possession and occupancy of a piece of ground claimed by appellant as a portion of, and included within, the surface boundaries of the Excelsior No. 1 lode mining claim, and by appellees as a portion of, and included within, the surface boundaries of the Black Queen lode mining claim. The Excelsior No. 1 was discovered July 28, 1881, and the location certificate was filed for record August 18, 1881. The Black Queen was discovered July 29, 1881, and location certificate filed October 10, 1881. The ground in conflict is that portion of the south end of Excelsior No. 1 over which the Black Queen's north side line extends. This ground was, by reason of priority of location, a portion of Excelsior No. 1; and the right of the Black Queen owners to it depends upon the question of fact, whether the annual labor was performed upon the Excelsior lode in 1883 and 1885; and, if not, whether the acts of the Black Queen owners in filing additional or amended location certificates after such failure, and before a resumption of work thereon, was an effectual relocation of that portion of the Excelsior No. 1 lode claim now in controversy.

[49] Parts of the opinion are omitted.

Error is assigned upon the refusal to give certain instructions asked by appellant, and upon the giving of certain instructions asked by appellees. The main contention is presented by instruction No. 17 given at the request of appellees, which is as follows:

"If you find from the evidence that the Black Queen was a valid, existing mining location, and that the annual labor requisite to keep up the same had been performed, and that the owners of said Black Queen location filed an amended location certificate at any time while their holding was in this condition, and at a time when the Excelsior No. 1 lode had been abandoned by reason of the failure of the owners thereof, during the preceding year, to do their annual assessment work, and before such owners had resumed work upon the location so abandoned, and that such amended or additional location certificate, filed under the circumstances stated, covered the ground in controversy in this action, such filing would give the owners of the Black Queen location a valid title to the ground in controversy, and your verdict should be in their favor, provided you further find from the evidence that such owners kept up the annual assessment work until this action was brought."

We think that the law is therein fairly stated, and that it correctly enunciates the conditions under which a mining claim is subject to relocation as abandoned property, and one of the acts that constitute a valid relocation.

The acquisition of title to a mining claim is conditioned upon discovery and location, and the condition upon which title thereto may be held until patent is issued is the performance of the annual development work. Section 2324 of the Revised Statutes of the United States requires that "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure, and before such location. * * *" The territory theretofore segregated by discovery and location becomes abandoned, in the sense that it is subject to location after such failure, and before resumption of work thereon, in the same manner as other unappropriated public mineral domain, and is subject to be taken by the owners of a junior location, under Gen. St. § 2409, p. 724, which provides: "If at any time the locator of any mining claim * * * shall be desirous * * * of taking in any part of an over-lapping claim which has been abandoned, * * * such locator, or his assigns, may file an additional certificate, * * *" etc.

The case of Omar v. Soper, 11 Colo. 380, 18 Pac. Rep. 443, is relied on as laying down a doctrine at variance with this conclusion,

but we think the cases are clearly distinguishable. * * * The language of the court [in Omar v. Soper] should be read in the light of the facts in that case, and, in so far as any expressions are found therein that may seem to contradict the conclusion we have arrived at, they should be modified.

Much stress is laid upon the fact that the additional certificates filed February 23 and June 16, 1884, did not, in terms, specify that they were filed for the purpose of taking in overlapping abandoned ground. We think this objection is without merit. The statute provides that additional location certificates may be filed for certain purposes. It does not require that such purposes should be expressed in the certificate, and in our opinion such specification is not essential. The filing of such certificate, if made under proper conditions, is effectual for all the purposes enumerated in the statute, whether such purposes are therein mentioned or not.

The essential condition, in this case, to enable the Black Queen owners to take in the ground in controversy, was the failure to do the annual assessment work on the Excelsior No. 1 lode for the year 1883 and for the year 1885. There was conflicting testimony introduced on the trial as to whether such work had been done; some positive in its character, that the work had been done for these years, respectively. Appellant requested the court to instruct the jury as follows: No. 4: "The court instructs the jury the law does not presume a forfeiture, and if the plaintiffs claim that part of the Excelsior No. 1 lode became forfeited, and open to be relocated, which they included and embraced within their amended or additional location certificates filed in 1884 or 1886, the burden of proving the annual labor was not done on the Excelsior No. 1 lode is on plaintiffs, and unless they have shown you, by a fair preponderance of evidence, the work was not done, then you are to determine that question in favor of defendant." This was refused. This instruction should have been given. It expresses the rule as to the burden of proof on the question of forfeiture very favorably to the appellees. While there is some conflict of authority as to the necessity of specially pleading a forfeiture, there is no exception as to the rule, of which we are advised, that relieves a party asserting a forfeiture from the burden of proving it. * * *

The refusal to give instruction No. 4 was an error prejudicial to appellant, and compels the reversal of the judgment. The judgment is reversed, and cause remanded.

SULLIVAN et al. v. SHARP et al.

1905. Supreme Court of Colorado. 33 Colo. 346, 80 Pac. 1054.

Action by John Sullivan and others against J. R. Sharp and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

The only question argued and presented for determination by this appeal is the effect of an additional or amended location certificate, as provided in section 3160, Mills' Ann. St., on the title to a mining location discovered and located within the boundaries of a prior valid location, as against the title of the claimant to the latter, who had neglected to perform the annual assessment for the year next preceding the date of the filing of such amended certificate. The subject-matter of controversy is the conflict between two mining locations known as the Quaking Asp and Dog Nest lodes. These two locations cover practically the same territory. The Quaking Asp is the prior location. The Dog Nest was discovered and located within the boundaries of the Quaking Asp in the year 1900. The Dog Nest applied for a patent, which application was adversed by the Quaking Asp. The pleadings are of the character usually filed in adverse cases. By paragraph 7 of the answer filed on behalf of the claimants of the Dog Nest, it was averred that the claimants of the Quaking Asp had failed and neglected to perform the annual assessment on their claim for the year 1900, and that subsequent to the 1st day of January, 1901, the claimants of the Dog Nest filed an amended and an additional location certificate on their claim. Under this location they contended that the overlapping territory embraced within the boundaries of the Quaking Asp was duly and legally located and appropriated as a part and parcel of the Dog Nest lode. On the trial it was stipulated that the only issue between the parties was the performance of the annual assessment work on the Quaking Asp for the years 1899 and 1900. The testimony was conflicting on these questions of fact, but at the conclusion of the trial the court ruled that the filing of the amended and additional location certificate on the Dog Nest was of no avail unless it appeared that the original discovery and location of that claim was on unappropriated public domain. The jury returned a verdict in favor of the plaintiffs, and defendants appeal.

GABBERT, C. J. (after stating the facts).—According to the verdict, the annual labor for 1899 on the Quaking Asp had been performed. It was therefore a valid subsisting location when title to the premises in controversy was sought to be initiated by the claimants of the Dog Nest. A location based upon a discovery within the limits of an existing and valid location is void. Lebanon M. Co. v. Con. Rep. M. Co., 6 Colo. 371; Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633; Michael v. Mills, 22 Colo. 439, 45 Pac. 429; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69; Reynolds v. Pascoe (Utah) 66 Pac. 1064; Lindley on Mines (2d Ed.) § 337; Tuolumne Consol. M. Co. v. Maier, 134 Cal. 583, 66 Pac. 863; Little Pittsburgh Cons. M. Co. v. Amie M. Co. (C. C.) 17 Fed. 57.

The statute in question provides, in substance, that if the locator of a mining claim shall apprehend that his original certificate of location was defective or erroneous, or that the requirements of the law in making a location had not been complied with, or in case he desires to change the surface boundaries of his claim, or take in any part of an overlapping claim which has been abandoned, that he may file an additional certificate. Its evident purpose was to permit the locator to cure errors and defects or supply omissions, so that a location which was merely defective might be rendered perfect, and also take in territory embraced in abandoned overlapping claims, if so desired. It cannot avail, however, except it appears that there has been an original location which is valid, though imperfect. Strepey v. Stark, 7 Colo. 614, 5 Pac. 111. In other words there must be some rights in the locator filing such certificate to the ground which it purports to include; otherwise it is of no effect.

The original location of the Dog Nest was a nullity. Not an act had been performed by the claimants of that location which gave them the slightest right to the ground in controversy. There were no errors or defects to cure or omissions to supply in order to perfect it; no rights in the premises to which the amended location certificate could attach or to which it could relate. The case is entirely different from Johnson v. Young, 18 Colo. 625, 34 Pac. 173. In that case the original location was valid, because the discovery upon which it was based was upon ground subject to appropriation, and it was held that the filing of an amended certificate perfected the title to the parts of the claim overlapping a prior location abandoned before the amended certificate was filed.

The judgment of the district court is affirmed.

Affirmed.[50]

Section 5.—Known Lodes in Placers.

FEDERAL STATUTE.

Sec. 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side

[50] "It, of course, is true that by amendment a void location cannot be made to cut out an intervening location; but there was no intervening location in the case of Sullivan v. Sharp. The Colorado decision [Johnson v. Young, ante] that a valid junior location could acquire conflicting senior ground by amendment after the senior ground became subject to relocation would seem to call for a different determination of Sullivan v. Sharp."—Costigan, Mining Law, 222.

thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof. Rev. St. U. S., § 2333.

McCONAGHY v. DOYLE ET AL.

1903. SUPREME COURT OF COLORADO. 32 Colo. 92, 75 Pac. 419.

ACTION by J. M. Doyle and others against John McConaghy. From a judgment for plaintiffs, defendant appeals. Reversed.

GABBERT, J.[51]—The subject-matter of controversy between the parties to this appeal is mining premises claimed by appellant as the Conejos, and the appellees as the Victor Addition, lode. Appellees, as the owners of the Victor Addition, brought suit against appellant, as defendant, in support of their adverse against the application of the latter for patent to the Conejos lode. From a judgment in favor of plaintiffs, the defendant appeals.

The boundaries of the respective claims are identical. The Conejos is the older location; having been located in November, 1893. There is no question about its validity originally. The only attack made upon it at the trial was that the assessment for 1895 had not been performed. The performance of the assessments for the subsequent years is not questioned. In February, 1896, the Victor Addition was located; the discovery and location being made upon tract C of a placer claim known as the "Eldorado." Application for patent on this placer was made on September 24, 1894, and thereafter prosecuted to completion. The patent therefor includes the tract upon which the discovery and location of the Victor Addition were made. The right so to do on the part of the claimants of the Victor Addition lode is asserted upon the ground that the vein upon which the discovery and location are based was known at the time of the application for patent upon the Eldorado placer. This proposition is controverted on the part of the claimant of the Conejos, the contention in his behalf being that the vein upon which the Victor discovery and location are based was not known at the time application for patent on the Eldorado placer was made. It is immaterial, therefore, whether the assessments was performed upon

[51] Part of the opinion is omitted.

the Conejos for 1895 or not, if it should appear, as contended by counsel for appellant, that the vein which is the basis of the location of the Victor Addition lode was not known to exist at the time of the application for patent on the Eldorado, for the reason that if the location of the Victor Addition was of no validity, because made within the boundaries of a prior valid placer location, it could not prevail over the Conejos. The real question, therefore, presented for determination, is, what constitutes a "known vein," within the limits of a placer at the time application for patent therefor is made, when that question is a collateral issue between a placer and a subsequent lode location? This was one of the litigated questions determined below, and it becomes necessary to briefly notice the testimony bearing on this question, for the purpose of ascertaining whether or not it was sufficient to sustain the finding of the jury that the vein located by the Victor Addition, by virtue of which the premises in controversy are claimed by appellees, was known at the time application for patent was made upon the Eldorado placer.

Tract C of the placer in question, within the boundaries of which the Victor Addition discovery shaft was sunk, and location notice erected, is 20 feet square, and is located something over 200 feet south of the discovery shaft of the Conejos, and a little to the west of the center of the premises in dispute. There was testimony to the effect that the vein upon which the discovery and location of the Conejos is based passes through tract C, and may be the same vein disclosed in the discovery shaft of the Victor Addition; that a vein was disclosed within a few feet of the northwest corner of tract C of the placer; and that, at the time application for patent for the placer was made, there were indications of the outcrop of a vein within tract C. This vein, however, was not claimed as the Victor Addition nor was any work done upon it until after the application for patent on the placer had been made. The shaft then excavated disclosed some mineral, but there is no testimony whatever of the existence of a vein within the limits of tract C, or that the vein upon which the Victor Addition claim was located contained or disclosed mineral of a quantity or quality which would justify its being operated as a mine. In short, the testimony is to the effect that while there may be evidence of the existence of a vein within the limits of tract C of the placer, and upon which the Victor Addition location is based, the shaft does not disclose, nor was any mineral in a vein within the limits of this tract ever disclosed, in quantity or value which would justify expenditure for the purpose of extraction.

Section 2333, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1433], provides, in substance, that patent to a placer shall not convey title to veins included within the boundaries thereof known to exist at the

time application for a patent for the placer is made, but that unknown veins embraced within the limits of a placer pass to the placer patentees. Known veins are thus exempted from patent applications on placers by operation of law, but unknown veins are not. The purpose of this statute was twofold: (1) To prevent title to known veins from being obtained by placer patents; and (2) to protect the placer patentee in his title to all mineral and other deposits within the boundaries of his claim not known to exist at the time application for patent therefor was made.

The earlier decisions on the subject of what constitutes "known veins" within the limits of a placer are not altogether clear or harmonious, but, without attempting to enter into any extended discussion of the question at this time, it is sufficient to say that it is now settled that, as between placer and subsequent conflicting lode locations, a known vein within the limits of a placer, when that question is raised collaterally, is one known to exist at the time of application for patent for such placer, and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them. Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201; Montana Central Ry. Co. v. Migeon (C. C.) 68 Fed. 811, affirmed in 77 Fed. 249, 23 C. C. A. 156; Brownfield v. Bier (Mont.) 39 Pac. 461; Casey v. Thieviege (Mont.) 48 Pac. 394, 61 Am. St. Rep. 511; U. S. v. Iron Silver M. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; Largey et al. v. Black, 10 Land Dec. Dep. Int. 156; Butte & B. M. Co. v. Sloan (Mont.) 40 Pac. 217; 2 Lindley on Mines, § 781.

It is also settled that the burden of proof in such circumstances is upon the lode claimant to establish by clear and convincing testimony that the vein or veins which he claims are exempted from the placer application by operation of law are of the character which will render them known veins, as above defined. Mon. Central. Ry. Co. v. Migeon, supra; 1 Snyder on Mines, § 666; Cripple Creek Gold Min. Co. v. Mt. Rosa Mining, Milling & Land Co., 26 Land Dec. Dep. Int. 622.

These decisions are based upon the proposition that one claiming land as a lode location, as against a prior placer location upon which patent has issued, must establish that the ground so claimed was known to be valuable to operate as a lode mining claim when application for patent was made upon the placer, and that, unless this does appear as a fact, he will not be permitted to take it from another who has previously located it as a placer claim, and obtained patent therefor. Mere outcroppings or other indications of a vein within the limits of a placer, or evidence of the existence of a vein which might be sufficient to support a lode location as against a conflicting lode claim, or sustain a lode location as

against a subsequent placer location in an adverse proceeding, are not sufficient to establish the existence of a known vein or lode within the boundaries of a placer prior in point of time, and which has been patented.

The testimony in this case wholly fails to establish a state of facts which would justify the conclusion that a "known vein" existed within the limits of tract C of the Eldorado placer at the time the patent was applied for, or at any subsequent date. There may be a vein within this tract which shows mineral in appreciable quantities, but it does not appear that it is of such quantity or quality as would justify expenditures for the purpose of extracting it.

Since this cause was tried below, we have had occasion to consider the relative rights of locators of mineral claims of one class, as against subsequent locators of another class, in the case of Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207, which we cite as an additional authority supporting our conclusion that the evidence in this case wholly fails to establish the existence of a known vein within the limits of tract C of the Eldorado placer.

In discussing the location of the Victor Addition, which was within the boundaries of tract C, we must not be understood as recognizing that the locators of the lode had the right to enter upon tract C, and there prospect for the purpose of discovering a vein. That question is immaterial in this case, for two reasons: (1) The testimony fails to establish the existence of any vein in tract C which was exempt from the operation of the patent; and (2) the work claimed as the discovery shaft of the Victor Addition did not disclose a known vein, within the meaning of the law, as applied to the facts of this case. * * *

The contention that the application for patent of the Eldorado placer could not be amended so as to take in the discovery shaft of the Victor Addition lode is clearly without merit. This amendment, in so far as it has any bearing on the case, only reduced the area of tract C, and therefore did not embrace any additional territory. Consequently the relative rights of the placer and lode were in no manner changed, because tract C, as originally described in the patent applied for, included the Victor Addition shaft. The fact that such application was amended after location of the Victor Addition lode is not material, in the circumstances of this case. At the time the original application for patent on the Eldorado placer was filed, the vein within the limits of tract C was not a "known vein," and its character in this respect has not been changed at the time the placer application for patent was amended.

The Conejos lode, and also a claim known as the "Unexpected," were located prior to the application for patent on the Eldorado placer. In both instances the ground embraced within these lodes

included tract C. The location of each lode claim was duly perfected. For these reasons, it is asserted that, according to the decision in Noyes v. Mantel, [127 U. S. 148] it must be held that, when patent was applied for upon the placer, the patentee was charged with notice of the existence of a known vein within the limits of tract C. The Unexpected was abandoned prior to the issuance of patent for the placer, and, as no mineral was disclosed in any vein upon this claim which would justify expenditure for the purpose of extraction, the fact that the Unexpected was once an existing lode location is of no moment. Migeon v. Mont. Central Ry. Co., 77 Fed. 249, 23 C. C. A. 156. Whether or not the placer mentioned in Noyes v. Mantel was located subsequent or prior to the lode claim conflicting therewith is not expressly stated, but, as we read that case, it appears the lode was the prior location, for it was held that the statute—section 2333, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1433]—did not apply to lodes or veins within the boundaries of a placer which had been previously located. The test, then, in applying the law as announced in Noyes v. Mantel, is not the relative dates of the location of the lode and application for patent on the placer, but the relative dates of the respective locations. What might now be the law, in case it appeared the Conejos was located prior to the Eldorado placer, it is not necessary to determine, for that question is not presented, and we express no opinion on that proposition.

From the record now before us, it does not appear that the Victor Addition lode was located upon a vein exempted from the operation of the patent issued on the Eldorado placer. Consequently, its validity as a lode location was not established.

The judgment of the district court is reversed, and the cause remanded for a new trial. Reversed and remanded.[52]

[52] But in Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842, the view is adopted that any lode which will support a location and was known to be such at the time of application for patent of the placer is a "known lode." The opinion by Brantly, C. J., says that this "is a just rule; for if the quartz claimant be required in all cases to show that the vein must be known to contain at the time of the application for patent ore of such extent and value that it can be extracted with profit without previous exploitation, in accordance with the theory of counsel for plaintiffs as indicated by the instruction requested, then it would scarcely ever be possible in localities where the tops of the veins have been leached to establish the existence of a known vein in the ground covered by the placer patent. Different conditions are found in different localities. It is often the case that a lode or vein, well defined on the surface, contains small values at the surface, whereas a moderate amount of development exposes below ore bodies of immense value. It is well known that this condition prevails generally throughout the mining districts of Montana. To say that such veins are not among those excepted from the operation of the placer patent would be equivalent to declaring the rule that the particular vein, though clearly ascertained, must be known to contain at the surface deposits which may then be profitably extracted, or the application for the placer patent of itself forever thereafter excludes

CLIPPER MINING COMPANY v. ELI MINING & LAND COMPANY.

1904. SUPREME COURT OF THE UNITED STATES.
194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. 632.

IN error to the Supreme Court of the State of Colorado to review a judgment which affirmed a judgment of the District Court of Lake County in that state in favor of plaintiffs in an action in support of an adverse claim of the owners of a placer mining location against an application for a patent for a lode claim within the exterior boundaries of the placer location. *Affirmed.*

Statement by Mr. Justice BREWER:

On December 12, 1877, A. D. Searl and seven associates made a location of placer mining ground near the new mining camp of Leadville. The claim embraced at that time 157.02 acres of land. The original locators shortly conveyed all their interest to A. D. Searl, who applied for a patent on July 5, 1878. The application was met at the Land Office with a multitude of adverse claims. Settlements were made with some of the contestants, and on November 10, 1882, an amended application for patent was filed, including only 101.916 acres. This application was rejected by the Commissioner of the General Land Office on March 6, 1886, and his decision was affirmed by the Secretary of the Interior on November 13, 1890. On November 25, 1890, four lode claims, known as the Clipper, Castle, Congress, and Capital, were located by parties other than the owners of the placer claim within the exterior boundaries of that claim. These four lode claims became, by mesne conveyances, the property of the Clipper Mining Company. It applied for a patent, and on November 23, 1893, the defendants in error, as the owners of the Searl placer location, filed an adverse claim and commenced this action in the district court of Lake county, in support of that claim. Judgment was rendered in favor of the plaintiffs, which was affirmed by the supreme court of the state (29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286,) and thereafter this writ of error was sued out.

Mr. Justice Brewer delivered the opinion of the court:[53]

The location of the placer mining claim and both the original and amended applications for patent thereof were long prior to the locations of the lode claims, and the contention of the plaintiffs is that they, by virtue of their location, became entitled to the exclusive

claim by one who knows or discovers its value. The purpose of the statute is to require good faith on the part of the placer claimant, so that he may not, under the cover of a large area of land which he may acquire under the name of placer, obtain title to the quartz deposits also, without making the proper claim for them, and the additional payment required by law for the lands containing them." (94 Pac. at 848.)

[53] Parts of the opinion are omitted.

possession of the surface ground; that the entry of the lode discoverers was tortious and could not create an adverse right, even though, by means of their entry and explorations they discovered the lode claims. The defendant, on the other hand, contends that the original location of the placer claim was wrongful, for the reason that the ground included within it was not placer mining ground; that the intent of the locators was not placer mining, but the acquisition of title to a large tract of ground contiguous to the new mining camp of Leadville, and likely to become a part of the townsite. In fact, it was thereafter included within the limits of the town, and on it streets and alleys have been laid out and many houses built and occupied by individuals claiming adversely to the placer location.

It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the conclusions of the highest court of a state upon questions of fact. *Republican River Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315, 23 L. ed. 515; *Dower* v. *Richards,* 151 U. S. 658, 38 L. ed, 305, 14 Sup. Ct. Rep. 452; *Israel* v. *Arthur,* 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; *Noble* v. *Mitchell,* 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; *Hedrick* v. *Atchison, T. & S. F. R. Co.* 167 U. S. 673–677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922; *Turner* v. *New York,* 168 U. S. 90–95, 42 L. ed. 392–394, 18 Sup. Ct. Rep. 38; *Egan* v. *Hart,* 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the supreme court. * * *

So far as the record shows—and the record does not purport to contain all the evidence—the placer location is still recognized in the Department as a valid location. Such also was the finding of the court; and being so there is nothing to prevent a subsequent application for a patent and further testimony to show the claimant's right to one. Undoubtedly when the Department rejected the application for a patent it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have.

The fact that many years have elapsed since the original location of the placer claim, and that no patent has yet been issued therefor, does not affect its validity, for it is a well-known fact, as stated by the court of appeals in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* 61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4, 16, that "some of the richest mineral lands in the United States, which have been owned,

occupied, and developed by individuals and corporations for many years, have never been patented." * * *

By § 2322 (U. S. Comp. Stat. 1901, p. 1425) it is provided that—

"The locators of all mining locations . . . on any mineral vein, lode, or ledge, situated on the public domain, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." * * *

It will be seen that § 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one, without his consent, or, at least, his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mine, and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In *Belk* v. *Meagher,* 104 U. S. 279, 283, 26 L. ed. 735, 737, it was said by Chief Justice Waite that "a mining claim perfected under the law is property in the highest sense of that term;" and in a later case (*Gwillim* v. *Donnellan,* 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 1112) he adds:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second."

In *St. Louis Min. & Mill. Co.* v. *Montana Min. Co.* 171 U. S. 650, 655, 43 L. ed. 320, 322, 19 Sup. Ct. Rep. 61, 63, the present Chief Justice declared that "where there is a valid location of a mining claim, the area becomes segregated from the public domain, and the property of the locator." Nor is this "exclusive right of possession and enjoyment" limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground becomes subject to an exclusive right of possession and enjoyment by the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location, or, in the words of Chief Justice Waite,

just quoted, while there is "a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States." There is no provision for, no suggestion of, a prior termination thereof.

By § 2329, placer claims are subject to entry and patent "under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." The purpose of this section is apparently to place the location of placer claims on an equality both in procedure and rights with lode claims.

If there were no other legislation in respect to placer claims the case before us would present little doubt; but following this are certain provisions, those having special bearing on the case before us being found in § 2333. Parties obtaining a patent for a lode claim must pay $5 an acre for the surface ground, while for a placer claim the government only charges $2.50 an acre. By § 2333 it is provided that one who is in possession of a placer claim and also of a lode claim included within the boundaries of the placer claim shall, on making application for a patent, disclose the fact of the lode claim within the boundaries of the placer, and upon the issue of the patent payment shall be made accordingly; that if the application for the placer claim does not include an application for a vein or lode claim known to exist within the boundaries of the placer, it shall be construed as a conclusive declaration that the placer claimant has no right of possession of that vein or lode; and further, that where the existence of a vein or lode within the boundaries of a placer claim is not known, the patent for the placer claim shall convey all valuable mineral and other deposits within its boundaries.

A mineral lode or vein may have its apex within the area of a tract whose surface is valuable for placer mining, and this last section is the provision which Congress has made for such a case. That a lode or vein, descending as it often does to great depths, may contain more mineral than can be obtained from the loose deposits which are secured by placer mining within the same limits or surface area, naturally gives to the surface area a higher value in the one case than the other, and that Congress appreciated this difference is shown by the different prices charged for the surface under the two conditions. Often the existence of a lode or vein is not disclosed by the placer deposits. Hence ground may be known to be valuable and be located for placer mining, and yet no one be aware that underneath the surface there is a lode or vein of greater value. A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. A lode or vein may be known to exist at the time of the placer location or not known until long after the patent therefor has been issued. There being no necessary connection between the placer and the vein, Congress by the section has provided that in an application for a placer patent the applicant

shall include any vein or lode of which he has possession, and that if he does not make such inclusion the omission is to be taken as a conclusive declaration that he has no right of possession of such vein or lode. If, however, no vein or lode within the placer claim is known to exist at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered.

While by the statute the right of exclusive possession and enjoyment is given to a locator, whether his location be of a lode claim or a placer claim, yet the effect of a patent is different. The patent of a lode claim confirms the original location, with the right of exclusive possession, and conveys title to the tract covered by the location, together with all veins, lodes, and ledges which have their apexes therein, whereas the patent to the placer claim, while confirming the original location and conveying title to the placer ground, does not necessarily convey the title to all veins, lodes, and ledges within its area. It makes no difference whether a vein or lode within the boundaries of a lode claim is known or unknown, for the locator is entitled to the exclusive possession and enjoyment of all the veins and lodes, and the patent confirms his title to them. But a patent of a placer claim will not convey the title to a known vein or lode within its area unless that vein or lode is specifically applied and paid for.

It is contended that because a vein or lode may have its apex within the limits of a placer claim a stranger has a right to go upon the claim, and, by sinking shafts or otherwise, explore for any such lode or vein, and on finding one obtain a title thereto. That, with the consent of the owner of the placer claim, he may enter and make such exploration, and if successful, obtain title to the vein or lode, cannot be questioned. But can he do so against the will of the placer locator? If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface. Of what value then would the placer be to the locator? Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface he cannot continue his workings. And if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely destroyed. In this connection it may be well to notice the last sentence in § 2322. That section, from which we have just quoted, is the one which gives a locator the right to pursue a vein on its dip outside the vertical side lines of his location. The sentence, which is a limitation on such right, reads: "And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It would seem strange that one owning a vein, and having a right in pursuing it to enter beneath the surface of another's location,

should be expressly forbidden to enter upon that surface, if, at the same time, one owning no vein, and having no rights beneath the surface, is at liberty to enter upon that surface, and prospect for veins as yet undiscovered.

We agree with the supreme court of Colorado as to the law when it says that "one may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or, by his conduct, is estopped to complain of it." Perhaps if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work, and certainly if he acquiesces in their action, he cannot, after they have discovered a vein or lode, assert right to it, for, generally, a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer ought not thereafter to appropriate that which they have discovered by such search.

The difficulty with the case presented by the plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespasses, and as a general rule no one can initiate a right by means of a trespass. * * *

If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts or otherwise, is undoubtedly a trespass, and such a trespass cannot be relied upon to sustain a claim of a right to veins and lodes. It will not do to say that the right thus claimed is only a right to some thing which belongs to the United States, and which will never belong to the placer locator, unless specifically applied and paid for by him, and therefore that he has no cause of complaint; for if the claim of the lode locator be sustained it carries, under §§ 2320 and 2333, at least 25 feet of the surface on each side of the middle of the vein. Further, if there be no prospecting, no vein or lode discovered until after patent, then the title to all veins and lodes within the area of the placer passes to the placer patentee, and any subsequent discovery would enure to his benefit.

Again, it is contended that the claims which the defendant sought to patent were lode claims; that the only title set up in the complaint in the adverse suit was a placer title, and that a placer claimant has no standing to maintain an adverse suit against lode applications. * * *

Under the statutes a lode claim carries with it the right to a certain number of acres, and where one is in peaceable possession of a valid placer claim, if a stranger forcibly enters upon that claim, discovers and locates a lode claim within its boundaries, and then ap-

plies for a patent, surely the placer claimant has a right to be heard in defense of his title to the ground of which he has been thus forcibly dispossessed. If the application for a patent of the lode claim is not adversed it will pass to patent, and it may well be doubted whether the placer claimant could, after the issue of a patent under such circumstances, maintain an equitable suit to have the patentee declared the holder of the legal title to the ground for his benefit. If the placer claimant can be thus deprived of his possession and title to a part of his ground, he may be in like manner dispossessed of all by virtue of many forcible trespasses and lode discoveries.

The amount of land embraced in this placer location was about 100 acres, while the land claimed under the several lode locations was a little over 35 acres. Can it be that the placer claimant had no right to be heard in court respecting the claim of the lode claimants to so large a portion of the placer ground?

We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives to them the lodes in controversy. * * *

The Land Office may yet decide against the validity of the lode locations, and deny all claims of the locators thereto. So, also, it may decide against the placer location, and set it aside; and in that event all rights resting upon such location will fall with it.

Finally, we observe that the existence of placer rights and lode rights within the same area seems to have been contemplated by Congress, and yet full provision for the harmonious enforcement of both rights is not to be found in the statutes. We do not wonder at the comment made by Lindley (1 Lindley, 2d ed. § 167) that "the townsite laws, as they now exist, consist simply of a chronological arrangement of past legislation, an aggregation of fragments, a sort of 'crazy quilt,' in the sense that they lack harmonious blending. This may be said truthfully of the general body of the mining laws." Many regulations of the Land Department and decisions of courts find their warrant in an effort to so adjust various statutory provisions as to carry out what was believed to be the intent of Congress and at the same time secure justice to miners and those engaged in exploring for mines. If we assume that Congress, recognizing the co-existence of lode and placer rights within the same area, meant that a lode or vein might be secured by a party other than the owner of the placer location within which it is discovered,—providing his discovery was made without forcible trespass and dispossession,—it may be that a court of equity is competent to provide by its decree that the discoverer of the lode, within the placer limits, shall be secured in the temporary possession of so much of the ground as will enable him to successfully work his lode, protecting, at the

same time, the rights of the placer locator. But such equitable adjustment of coexisting rights cannot be secured in a simple adverse action, and it would be, therefore, beyond the limits of proper inquiry in this case to determine the rights which may exist, if, in the end, the placer location be sustained and a discovery of the lodes without forcible trespass and dispossession established.

But for the present, for the reasons above given, we think *the judgment of the Supreme Court of Colorado was right, and it is affirmed.*

The Chief Justice and Mr. Justice White dissent.

WASHOE COPPER CO v. JUNILA et al.

1911. Supreme Court of Montana. 43 Mont. 178, 115 Pac. 917.

Holloway, J.[54]—This action was brought by the Washoe Copper Company against Junila and others to recover damages for ores extracted from [placer] ground claimed by the plaintiff, and for an injunction to restrain further trespasses. * * *

Thereafter Hall and others filed a complaint in intervention. * * * The trial court found in favor of the defendants and interveners, and rendered a decree in favor of interveners, adjudging them to be the owners of the ground claimed by them [as a known lode in placer 765]. From the decree and an order denying it a new trial, the plaintiff has appealed. * * *

[3] 3. As a part of their proof, interveners introduced in evidence, over the objection of plaintiff, a certified copy of the declaratory statement of the Morning Star quartz lode mining claim. This declaratory statement purports to have been made by Charles Colbert in 1877, and recites that on July 2, 1877, Colbert made discovery of mineral-bearing rock in place at a point which is now within the boundaries of the ground claimed by plaintiff. It is conceded that the declaratory statement was not verified as required by the law in force at the time; but in offering the certified copy counsel for interveners say: "The purpose of offering this, may it please the court, is not to prove title under the location itself, but for the purpose of showing that this vein was known to exist at the time when he located it by Charles Colbert, and to show what was done by Charles Colbert and others with reference to working the vein." In O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302, this court held that a declaratory statement which does not contain the required affidavit is void, and that decision has been followed uniformly since. See

[54] Parts of the opinion are omitted.

Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806. Since the Morning Star declaratory statement was void, the receipt in evidence of a certified copy of it was error.

[4] It is apparent from the statement of counsel made when the copy was offered that the purpose of introducing it was to show general knowledge on the part of the people of the community that a vein existed within the boundaries of the placer prior to the application for patent, presumably upon the theory that proof of such condition in 1877 would tend in some degree to establish knowledge of a similar condition when the application for placer patent was made in February, 1880. That a void instrument cannot impart constructive knowledge to any one is elementary; and the fact that the trial court admitted this evidence, and that in finding No. 1 reference is made to the Morning Star location, and the further fact that the court did not find specifically that the placer patentees had actual knowledge of the existence of the vein at the time when they applied for patent, but only that they had such knowledge, actual or constructive, seem to justify the conclusion that the court must have attached some importance to the contents of this declaratory statement.

[5] In order to exclude a lode from a placer claim, the lode must have been known at the time the application for placer patent was made; but actual knowledge on the part of the placer applicant is not absolutely essential. In Iron-Silver Min. Co. v. Mike & Starr G. & S. Min. Co., 143 U. S. 394, 12 Sup. Ct. 543, 30 L. Ed. 201, it is said: "It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government." This rule has been followed in the mining states generally. Brownfield v. Bier, 15 Mont. 403, 39 Pac. 461.

It seems a fair inference from this record that the placer patentees who denied actual knowledge of the existence of a vein within the boundaries of their placer claim at the time of their application for patent were [erroneously] charged with knowledge of the existence of such vein by the evidence furnished by this declaratory statement. * * *

[7] The immateriality of the[declaratory statement as] evidence is also apparent, since neither plaintiff nor interveners claimed under the Morning Star location. In fact, the evidence shows that that claim was abandoned. * * *

[10] 5. In a number of instances the court permitted the interveners to show, over plaintiff's objection, that there had never been any placer mining carried on on placer 765. The evidence was alto-

gether immaterial. The placer patent to Marsh and Nichols established conclusively the fact that the ground was and is placer; and the effect of the patent cannot be overcome by evidence that placer mining operations were never carried on. Dahl v. Raunheim, 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324; Butte & Boston Min. Co. v. Sloan, 16 Mont. 97, 40 Pac. 217.

[11] 6. The trial court found that at the date of the application for placer patent there was a well-known lode within the boundaries of placer 765 disclosed in workings at the Morning Star shaft; that the vein was such as to except it from the general grant of the placer patent, under section 2333, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1433). * * *

In finding No. 8 the trial court accepted interveners' theory, and decreed to them the vein and 25 feet on each side for 1,500 feet, and thereby carved out of the ground claimed by plaintiff a parcel 50 feet wide and about 1,500 feet long. * * * Upon the record before us, interveners were not entitled to affirmative relief. Assuming the existence of a known lode within the placer at the time the application for patent was made, such lode is open to location at this time, so far as we are informed by this record; and, if so, the trial court cannot by its decree preclude the plaintiff or any one else from locating it.

For the errors heretofore considered the judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.[54a]

Section 6.—Adverse Possession as a Substitute for the Acts of Location.

HUMPHREYS ET AL. v. IDAHO GOLD MINES DEVELOPMENT CO.

1912. SUPREME COURT OF IDAHO. 120 Pac. 823.

Action by Stacy W. Humphreys and another against the Idaho Gold Mines Development Company. From an order vacating a default judgment for plaintiffs, they appeal. Affirmed.

AILSHIE, J.[55]—This is an appeal from an order setting aside a

[54a] In Butte Land & Investment Co. v. Merriman, 32 Mont. 402, 80 Pac. 675, 108 Am. St. 590, the fact that two adverse suits which were brought against a placer applicant by lode claimants were determined in favor of the placer applicant was not deemed an adjudication that there was no known lode within the conflict area affected by these suits, as against third parties who did not claim under the adversers.

[55] Parts of the opinion are omitted.

judgment and opening up a default. The action was commenced by the plaintiffs, who are appellants herein, for the purpose of quieting their title to the Exchequer No. 1 and Exchequer No. 2 lode mining claim. * * * 2. The other question presented in this case is the sufficiency of the answer. The appellant contends that the answer is not sufficient to raise an issue.

[4] The defendant by its answer alleges a prior location of the ground covered by the Exchequer No. 1 and No. 2 claims, and sets up copies of the location notices, and alleges a discovery and the performance of all the acts and things necessary to be done under the law in order to hold a mining claim.

As a further defense, the defendant alleges that it has been in the open, exclusive and adverse possession of the claims prior to the initiation of the claim of plaintiff for a period exceeding that prescribed by the statute of limitations of this state for adverse possession, and that during such time it continuously occupied and worked the property and placed valuable improvements thereon and did the work necessary to hold a mining claim. * * *

Passing now to the other question, we find it stated thus in appellant's brief: "There can be no valid location of a mining claim in the state of Idaho as against the right of adverse claimants, except by compliance with the mining acts of Congress and of the state of Idaho." Appellant thereupon cites a number of cases and enters into a very able argument in support of the contention that, under the provisions of section 2332 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1433), a mining claim cannot be held by adverse possession as against another locator, even though that possession has continued during the full period prescribed by the statute of limitations for the commencement of such actions, unless such claimant has posted and recorded a notice of location as required by law. Appellant places special reliance upon McCowan v. McClay, 16 Mont. 234, 40 Pac. 602, and Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207. Appellant's contention is supported by the authority of the foregoing cases, but the great weight of authority seems to be to the contrary. The Supreme Court of New Mexica in Upton v. Santa Rita Mining Co., 14 N. M. 96, 89 Pac. 275, had occasion to consider this question, and there reached the conclusion which is stated as follows by the court, speaking through Mr. Justice Pope: "We believe that the true rule on the subject is succinctly stated in Altoona Co. v. Integral Co., 114 Cal. 100, 45 Pac. 1047, where it is said that 'working for the statutory period before the adverse right exists is equivalent to a location under the act of Congress,' and in Belk v. Meagher, 104 U. S. 279, 287, 26 L. Ed. 735, where it is declared to be the 'equivalent of a valid location.' In other words, a party who has done such work occupies the status and possesses the rights of a locator, no more and no less. As in the case of a holder of a valid location, he has good title as against

all but the government, so long as he does the annual labor. * * * When such party comes to apply for patent, his occupancy must be proven under certain regulations of the department (2 Lindley, 1714), and, when so proved, if there be no adverse claimant, they are sufficient, as the statute says, 'to establish a right to a patent.' But in this he stands on the same basis as the holder of a location whose application is uncontested. The holder of such a possession, no less than the holder of a location, must possess the necessary qualifications as to citizenship. Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419. He must prove, as well as the locator, the possession of $500 worth of labor or improvements before he can secure patent. Capital No. 5 Placer Min. Claim, 34 Land Dec. Dep. Int. 462, supra."

It will be seen that the New Mexico court and the authorities there cited hold in substance that continuous, open, adverse possession of mining ground for the full period required by the local statute of limitations, accompanied by an annual performance of the work or improvement on the claim required by the statute, obviates the necessity of making proof of the posting and the recording of a location notice, and supplies the place of record title. Mr. Snyder in his work on Mines (volume 1, § 672), in discussing the application of section 2332 of the Revised Statutes of the United States to the statute of limitations and the method of acquiring title thereby, says: "The effect of this statute is to relieve the applicant from the necessity of proving his location of the claim, the location by his predecessors, or the furnishing of an abstract of title, as in other cases, but he is required to furnish a duly certified copy of the statute of limitations of the state or territory, together with his own sworn statement showing the facts as to the origin of his title and continuation of his possession of the ground applied for, the area thereof, the nature and extent of the work done, whether there has been any opposition to or litigation regarding his possession of the ground, and, if so, when the same ceased, whether such cessation was the result of compromise or judicial decree, and any other facts bearing upon the question. * * * This provision relates solely to the procedure relative to proving title. All other steps in the matter of application are the same as heretofore outlined. And, where an adverse claim is filed in the land office, the applicant is obliged to defend his rights in a court of competent jurisdiction, the same as though his application were based upon a valid location; but upon the trial, as in the land office, proof of possession and work for a period equal to the statute of limitations would be equivalent to a location. It would seem that he ought also to furnish proof that the claim was actually marked upon the ground by him or his predecessors, and that such markings correspond substantially with the description of the claim as surveyed and applied for. His status, however, if an adverse claim is filed, is not so clear. If the owner's boundaries are plainly marked and an actual

adverse possession maintained, it would seem to be equally conclusive against the adverse claimant. But that is an independent fact, and the adverse claim must rest upon its own merits. The statute simply undertakes to dispense with many of the formalities in the way of proof in the absense of an adverse claim." Mr. Lindley in volume 2 of his work on Mines, at section 688, takes substantially the same view, and in support thereof places special reliance on the opinion of Judge Sawyer in 420 Mining Co. v. Bullion Mining Co., 3 Sawy. 634, Fed. Cas. No. 4,989, 11 Morr. Min. Rep. 608, 9 Nev. 240. To the same effect, see Harris v. Mining Co. (C. C.) 8 Fed. 863, 37 Land. Dec. Dept. Int. 772, and Snyder on Mines, §§ 155 and 357. It seems to us that the provisions of section 2332 of the Revised Statutes of the United States are intended to obviate the necessity for proof of posting and recording a notice of location in cases where the claimant to mineral ground has been in the actual, open, and exclusive possession of the ground for a period equal to that required by the local statute of limitations governing adverse possession of real estate. The adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs as are furnished by the county recorder.

[5] It still remains, however, for the person who asserts claim by adverse possession to have made a mineral discovery, and to have performed the annual assessment work, and to have had the boundaries of his claim so marked and indicated as to afford actual notice of the extent and boundaries of his claim and possession, and to have maintained an actual possession and excluded all adverse claimants for the full period prescribed by the statute, and to have likewise maintained his possession and occupancy during the subsequent period of time in which the adverse locator attempted to initiate his right by locating the claim.

We conclude that the order vacating the judgment and setting aside the default should be affirmed, and it is so ordered. Costs awarded to respondent.[56]

[56] "Appellees contend that the original locations of the Bell and White Eagle claims were void, because the land covered thereby was not subject to location at the time they were made; E. C. Bartlett and S. E. Williams having previously, on the 12th of March, 1885, made mining locations, known as the Bon Ton and Small Hope claims, on the same land. The evidence indicates that Bartlett and Williams had abandoned their claims when the Bell and White Eagle claims were located. After locating the Bon Ton and Small Hope claims, they never undertook to develop and maintain them. The Bell and White Eagle claimants took possession, and held and developed them by work and labor performed, and held adverse possession of the same for a longer time than the period of limitation prescribed by statute. This was sufficient to render their claim valid against every one except the United States. Mining Co. v. Willis, 127 U. S. 471, 8 Sup. Ct. 1214, 32 L. Ed. 172; Francoeur v. Newhouse (C. C.) 43 Fed. 236; Four Hundred and Twenty Min. Co. v. Bullion Min. Co., 3 Sawy. 634, Fed. Cas. No. 4,989; Harris v. Mining Co. (C. C.) 3 McCrary, 14, 8 Fed. 863." Battle, J., in Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 576, 91 Am. St. 87.

CHAPTER V.

THE LOCATION OF TUNNEL SITES AND OF BLIND VEINS IN TUNNELS.

FEDERAL STATUTE.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. Rev. St. U. S. § 2323.

COLORADO STATUTE.

If any person or persons shall locate a tunnel claim for the purpose of discovery, he shall record the same, specifying the place of commencement and termination thereof, with the names of the parties interested therein.—Rev. St. Colo., 1908, § 4207.

GENERAL LAND OFFICE RULES AND REGULATIONS.

16. The effect of section 2323, Revised Statutes, is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

17. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel, the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus

in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

18. A full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference. Land Office Mining Regulations, rules 16–18.

ENTERPRISE MIN. CO. v. RICO-ASPEN CONSOL. MIN. CO. ET AL.

1897. SUPREME COURT OF THE UNITED STATES.
167 U. S. 108, 42 L. ed. 97, 17 Sup. Ct. 762.

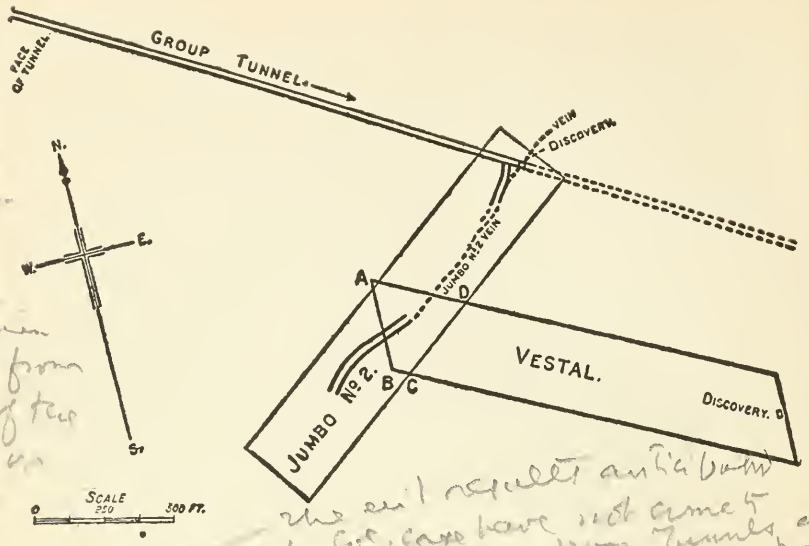
ON Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

The facts are these:

The Group tunnel site under which the Enterprise Mining Company, the defendant and appellant, claims the right to the ores in controversy, was located on July 25, 1887, and the certificate of location was filed in the office of the county clerk and recorder of the county in which the location was made on August 29, 1887.

The Vestal lode mining claim, under which the plaintiffs (the appellees) claim title, is based upon a discovery made on March 23, 1888. The claim was located on April 1, 1888, and the location certificate was filed for record on April 3, 1888.

The situation of the properties is sufficiently disclosed by the following diagram:



The ore in controversy is within the limits of the tract, A, B, C, D. As to this tract, the two locations, the Vestal and Jumbo No. 2, conflict. The owners of the Vestal claim made application in 1890 for a patent. No adverse proceedings were instituted by the defendant, and a patent for the claim was issued on February 6, 1892. At the time of these proceedings no discovery of a vein in the tunnel had been made. But on June 15, 1892, a vein was discovered 1,920 feet from its portal, at the place marked "Discovery" on the diagram. Immediately thereafter the defendant caused the boundaries of the claim Jumbo No. 2 to be located upon the surface of the earth, and a certificate of location to be duly recorded, in which it claimed 54 feet along the vein to the northeasterly of the tunnel, and 1,446 feet southwesterly. The position of this claim appears sufficiently on the diagram. The portion of this vein within the limits of the Vestal claim is about 750 feet from the line of the tunnel. This suit was commenced in the circuit court of the United States for the District of Colorado, on September 3, 1892, and was decided by that court in favor of the plaintiffs. 53 Fed. 321. On appeal to the court of appeals this decision was reversed (32 U. S. App. 75, 13 C. C. A. 390, and 66 Fed. 200), and the case remanded for further proceedings. Thereupon the case was brought here on a writ of certiorari.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

It will be observed that so far as the mere location of the two claims, Vestal and Jumbo No. 2, the former was prior in time to the

latter, and would, if there were no other facts, give priority of right to the ore within the limits of the conflicting territory. The tunnel was, however, located some eight or nine months before the discovery and location of the Vestal claim, and the statute gives to the owners of such tunnel the right to "all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist." By virtue of this section, therefore, the right of the defendant to this vein was prior to that of the plaintiffs to the mineral in their claim. In this respect the circuit court and the court of appeals agreed. The matters now in dispute are the extent of that right and the effect of a failure to "adverse" the application for a patent.

The right to this vein discovered in the tunnel is by the statute declared to be "to the same extent as if discovered from the surface." If discovered from the surface, the discoverer might, under Rev. St. § 2320, claim "one thousand five hundred feet in length along the vein or lode." The clear import of the language, then, is to give to the tunnel owner, discovering a vein in the tunnel, a right to appropriate 1,500 feet in length of that vein. When must he indicate the particular 1,500 feet which he desires to claim? Counsel for plaintiffs contend that it should be done when, in the first instance, the tunnel is located, and that, if no specification is then made, the line of the tunnel is to be taken as dividing the extent of the claim to the vein, so that the tunnel owner would be entitled to only 750 feet on either side of the tunnel; while counsel for defendant insist that he need not do so until the actual discovery of the vein in the tunnel. We think the defendant's counsel are right. In order to make a location, there must be a discovery; at least, that is the general rule laid down in the statute. Section 2320 provides: "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The discovery in the tunnel is like a discovery on the surface. Until one is made, there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery,—whether such discovery be made on the surface or in the tunnel. The case of Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, is not in point, for there the preliminary notice, which was made upon a discovery from the surface, simply claimed "1,500 feet on this mineral bearing lode," without further specification as to boundaries or direction; and it was held that that was equivalent to a claim for 750 feet in each direction from the discovery shaft.

It may be true, as counsel claim, that this construction of the statute gives the tunnel excavator same advantages. Surely, it is not strange that congress deemed it wise to offer some inducements for running a tunnel into the side of a mountain. At the same time, it

placed specific limitations on the rights which the tunnel owner could acquire. He could acquire no veins which had theretofore been discovered from the surface. His right reached only to "blind veins," as they may be called,—veins not known to exist, and not discovered from the surface before he commenced his tunnel. It required reasonable diligence in the prosecution of his work.[1] It placed a limit in length (3,000 feet) beyond which he might not go in his search for veins, and acquire any right under his tunnel location, and the veins to which he might acquire any rights were those which the tunnel itself crossed. Such is the import of the letter to which counsel refer, from Commissioner Drummond, of date September 20, 1872. Land Office Report, 1872, p. 60; 3 Copp's Land Owner, 130. It may be also noticed that in this letter the commissioner affirmed the right of location on either side of the tunnel, in these words: "When a lode is struck or discovered for the first time by running a tunnel, the tunnel owners have the option of recording their claim of fifteen hundred feet all on one side of the

[1] In Fissure Min. Co. v. Old Susan Min. Co., 22 Utah 438, 63 Pac. 587, Miner, J., for the court, said:

"Under section 2323, a failure to prosecute the work on the tunnel for six months is considered an abandonment of the right to all undiscovered veins on the line of such tunnel. Because of this the court properly found that the respondent was not entitled to the blind vein discovered under the tunnel, called the 'Calumet No. 1,' and was only entitled to the bore of the General Sheridan tunnel site, and to a space of surface ground 50 feet on each side of the mouth of the tunnel, and 100 feet extending in front thereof for dumping purposes. The balance of the claim on which the mouth of the tunnel is located was awarded to the appellant. We are of the opinion that this finding is sustained by the testimony."

The distinction between the right, on the one hand, to the blind veins and the right, on the other hand, to the bore of the tunnel and to its further projection is emphasized in the following passage from Morrison's Mining Rights, 14 Ed., 296:

"The A. C. expressly limits the claim of a tunnel site to lodes not known to exist within 3,000 feet from the face of such tunnel. Attempts have been made to evade this limitation by filing records of a second tunnel to begin at a point 3,000 feet in from the mouth of the tunnel projected from the surface, i. e., to begin at the end of the first 3,000 feet, taking 3,000 feet more and even third and fourth extensions have been so recorded.

"We regard these locations as absolutely void. But we draw the distinction between the right of a tunnel to undiscovered lodes and its right to bore through the mountain. The former is granted by act of congress, is limited by its terms, and cannot be enlarged. The latter, the right to bore, is a mere easement, exercised under district rules before the act, and there is no limitation on the claim of a tunnel to drive itself through the public domain as far as its owners may desire to penetrate.

"A tunnel in its record, therefore, in our opinion, can claim a right of way to drive to any expressed number of feet, but it cannot claim the statutory tunnel right to blind lodes beyond the first 3,000 feet; and the location of a second tunnel from the breast of the first is an attempt by a self-serving act to take from the prospector's right in the ground beyond 3,000 feet, a valuable privilege, which the Act of Congress has given him."

point of discovery or intersection, or partly on one and partly upon the other side thereof."

We hold, therefore, that the right to a vein discovered in the tunnel dates, by relation, back to the time of the location of the tunnel site, and also that the right of locating the claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating that claim the full length of 1,500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire.

It was well said by the court of appeals in its opinion in this case: "The striking characteristic of this section of the act is that it gives the right to the possession of certain veins or lodes to the diligent owner of a tunnel before his discovery or location of any lode or vein whatever, contingent only upon his subsequent discovery of such veins in his tunnel. Veins or lodes discovered on the surface or exposed by shafts from the surface must be found before any right to them vests (sections 2, 5, Act May 10, 1872; sections 2320, 2324, Rev. St.); but this section declares that the owners of a tunnel, by simply locating and diligently prosecuting it, without the discovery of any vein or lode whatever, 'shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.' "

In Mining Co. v. Brown, 11 Mont. 370, 383, 28 Pac. 732, 735, the supreme court of that state observed: "But has he [the tunnel owner] not an inchoate right in such veins, which right is kept alive by prosecution of work on the tunnel, according to law? This seems to be implied by the last clause of the statute, that 'failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel.' The fact that said nonaction on the part of the tunnel claimant should constitute an abandonment shows that it was the intent of congress to reserve such lodes from the commencement of the tunnel, while it was prosecuted according to law." See, also, Back v. Mining Co., 2 Idaho, 386, 17 Pac. 83.

The plaintiffs further contend that an act passed by the territoral legislature of Colorado in 1861 (Sess. Laws Colo. 1861, p. 166; Mills' Ann. St. § 3141) limits the right of the tunnel owner to veins discovered in the tunnel to 250 feet on each side of the tunnel. That section reads:

"Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to two hundred and fifty feet each way from said tunnel, on each lode so discovered."

But, if that section has not been in terms repealed by the legislature of Colorado, it was superseded by the legislation of congress,

as found in the Revised Statutes. Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521.

The remaining question is whether the failure to "adverse" the application for a patent for the Vestal claim destroyed or impaired the rights of the defendant. We think not. Sections 2325 and 2326, Rev. St., contain the legislation in reference to adverse claims. These provisions are substantially that when a party makes his application for a patent, if no adverse claim is filed within 60 days from publication of notice, it shall be assumed that the applicant is entitled to a patent; that, when an adverse claim is filed, "it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claims, and all proceedings * * * shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

Now, at the time the application for patent to the Vestal claim was presented and the proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be perceived, runs paralled to the line of the tunnel, and is distant therefrom some 500 feet. The presumption, of course, would be that the vein ran lengthwise, and not crosswise, of the claim, as located, and such a vein would not, unless it radically changed its course, cross the line of the tunnel. Whether it did or not, or whether any other vein should be found in the tunnel which should cross the territory of the Vestal, was a matter of pure speculation; and there would be no propriety in maintaining a suit to establish defendant's inchoate right, and delay the Vestal claimants in securing a patent on mere possibility, which might never ripen into a fact. The obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible, and certain right, and not a mere possibility. Of course, the owners of the Vestal claim had notice, from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develop, and so they were not prejudiced by the failure to "adverse." And as the defendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts, and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and therefore nothing lost by a failure so to do.

These are all the questions in the case. We are of opinion that the decision of the court of appeals is right, and it is affirmed.

CAMPBELL v. ELLET.

1897. Supreme Court of the United States.
167 U. S. 116, 42 L. ed. 101, 17 Sup. Ct. 765.

In Error to the Supreme Court of the State of Colorado.

On September 18, 1872, George C. Corning and other citizens of the United States located a tunnel site. They diligently prosecuted the work of excavation, expending therein $100,000.

On February 3, 1875, the Corning Tunnel Company, a corporation duly organized, was the owner of this tunnel location by sundry mesne conveyances from the locators thereof; and said tunnel company, while prosecuting the work of excavation, cut and discovered within the tunnel, and upon the line thereof, at a distance of 594 feet from its face, a vein of mineral bearing rock in place, which was named the Bonanza lode; and on said February 3d it posted at the face of the tunnel a plain sign and notice, giving the name of said vein, the point of discovery within the tunnel, the general course of the vein from the point of discovery, and claiming 750 feet of said vein on each side of the line of the tunnel. This Bonanza lode did not appear upon the surface of the ground, and was not known to exist prior to its discovery by the Corning Tunnel Company, as above stated.

On February 9, 1875, the tunnel company filed and caused to be recorded in the office of the clerk and recorder of the county of Boulder a location certificate of said Bonanza lode, giving the name of the lode so discovered, and the company as the locator thereof, the point in the line of the tunnel at which the lode was discovered, and claiming 750 feet of the vein upon each side thereof; also stating the general course of the vein. The location certificate was as follows:

"Territory of Colorado, County of Boulder. Know all men by these presents, that we, the Corning Tunnel Company, claim, by right of discovery and by right of location, 1,500 feet, linear and horizontal measurement, on the Bonanza lode, along the vein thereof, with all its dips, variations, and angles, together with the amount of surface necessary for working the same, and allowed by law; 750 feet of said lode so located lying and being easterly of the discovery on said lode, and 750 feet being westerly of said discovery, said lode being more particularly described as follows,

to wit: Beginning at a point in the Corning tunnel 594 feet from the face of said tunnel, and extending from said point 750 feet easterly and 750 feet westerly. The bearing of said lode is about north 78 degrees east. This lode was discovered in the Corning tunnel, and it is claimed under the provisions of section 4 of an act of congress approved May 10, 1872, in Gold Hill mining district. Said lode was discovered and was located on the 3d day of February, A. D. 1875. [Signed] Frederick A. Squires, Pres. Daniel A. Robinson, Secy."

Subsequently, the title to the tunnel and the lode passed to the defendant in error. After the discovery of said Bonanza lode, the owners of the tunnel continuously and diligently prosecuted the work on the lode, and expended each year thereon the sum of $100. On July 10, 1886, more than 11 years after the discovery of the Bonanza lode, the plaintiff in error, Campbell, and one Cyrus Taylor, with full knowledge of the tunnel claim and of the discovery and location of the Bonanza lode aforesaid, made a location of a certain lode, called by them the J. L. Sanderson lode. This location is on the same lode and vein as that described in the Bonanza location, and the discovery cut by which it was discovered by Campbell and Taylor is within 200 feet of the tunnel line. Campbell and Taylor did everything required to be done by the statutes of the United States in discovering and marking the point of discovery of the Sanderson lode, and in marking the boundaries of the claim on the surface of the ground, and thereafter did the requisite annual labor thereon. Having made application for a patent, the defendant in error filed an adverse claim, and commenced a suit, as required by the statute. Rev. St. § 2326. This, after a trial in the district court of Boulder county, Colo., was taken to the supreme court of the state, and by that court a judgment was entered in favor of the defendant in error, on the ground that the proceedings in respect to the tunnel, the discovery of the Bonanza lode, and the location thereof, vested in him a title to that lode to the distance of 750 feet from the line of the tunnel (18 Colo. 510, 33 Pac. 521), to reverse which judgment, Campbell sued out this writ of error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

In the case just decided, of Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., 17 Sup. Ct. 762, we have considered the law in respect to mining tunnels. Beyond what was there disposed of, only a single question requires consideration, and that is, does the failure to mark on the surface of the ground the point of discovery and the boundaries of the tract claimed destroy the right of the tunnel owner to the veins he has discovered in the tunnel?

It will be noticed that the tunnel company posted at the mouth

of the tunnel a notice of its discovery of this lode, and the extent of its claims thereon, and also that it caused to be filed in the office of the recorder of the county a location certificate, as required by the local statute. Mills' Ann. St. §§ 3150, 3151. It will also be perceived that section 2323, Rev. St., gives to the tunnel discoverer the right of possession of the veins. It in terms prescribes no conditions other than discovery. The words "to the same extent" obviously refer to the length along the line of the lode or vein. Such is the natural and ordinary meaning of the words and there is nothing in the context or in the circumstances to justify a broader and different meaning. Indeed, the conditions surrounding a vein or lode discovered in a tunnel are such as to make against the idea or necessity of a surface location. We do not mean to say that there is any impropriety in such a location, the locator marking the point of discovery on the surface at the summit of a line drawn perpendicularly from the place of discovery in the tunnel, and about that point locating the lines of his claim in accordance with other provisions of the statute. It may be true, as suggested in Morrison's Mining Rights (8th Ed. p. 182), that, before a patent can be secured, there must be a surface location. Rev. St. § 2325. But the patent is not simply a grant of the vein, for, as stated in the section, "a patent for any land claimed and located for valuable deposits may be obtained in the following manner." It must also be noticed that section 2322, in respect to locators, gives them the exclusive right of possession and enjoyment of all the surface within the lines of their locations, and all veins, lodes, and ledges the tops or apexes of which are inside such lines. So that a location gives to the locator something more than the right to the vein, which is the occasion of the location. But, without determining what would be the rights acquired under a surface location based upon a discovery in a tunnel, it is enough to hold, following the plain language of the statute, that the discovery of the vein in a tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and that a location on the surface is not essential to a continuance of that right. We do not mean to hold that such right of possession can be maintained without compliance with the provisions of the local statutes in reference to the record of the claim, or without posting in some suitable place, conveniently near to the place of discovery, a proper notice of the extent of the claim,—in other words, without any practical location; for in this case notice was posted at the mouth of the tunnel, and no more suitable place can be suggested, and a proper notice was put on record in the office named in the statute.

We are of opinion, therefore, that the question considered must

be answered in the negative. There is no error in the judgment of the supreme court of Colorado, and it is affirmed.

CALHOUN GOLD MINING COMPANY v. AJAX GOLD MINING COMPANY.

1901. Supreme Court of the United States.
182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. 885.

In error to the Supreme Court of the State of Colorado to review a decision affirming a judgment in an action for trespass on mining claims. *Affirmed.*

Mr. Justice McKenna delivered the opinion of the court:

This action was brought in one of the district courts of the state of Colorado by the defendant in error to recover damages from plaintiff in error for certain trespasses on, and to restrain it from removing ore from ground claimed to be within the boundaries of, the mining claims of defendant in error. The answer of plaintiff in error justified the trespasses and asserted a right to the ore by reason of the ownership of another mining claim and the ownership of a certain tunnel site.

The rights of the parties are based on, and their determination hence involves the construction of, the following sections of the Revised Statutes of the United States, empowering the location of mining claims:

"Sec. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or

ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

"Sec. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work of the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

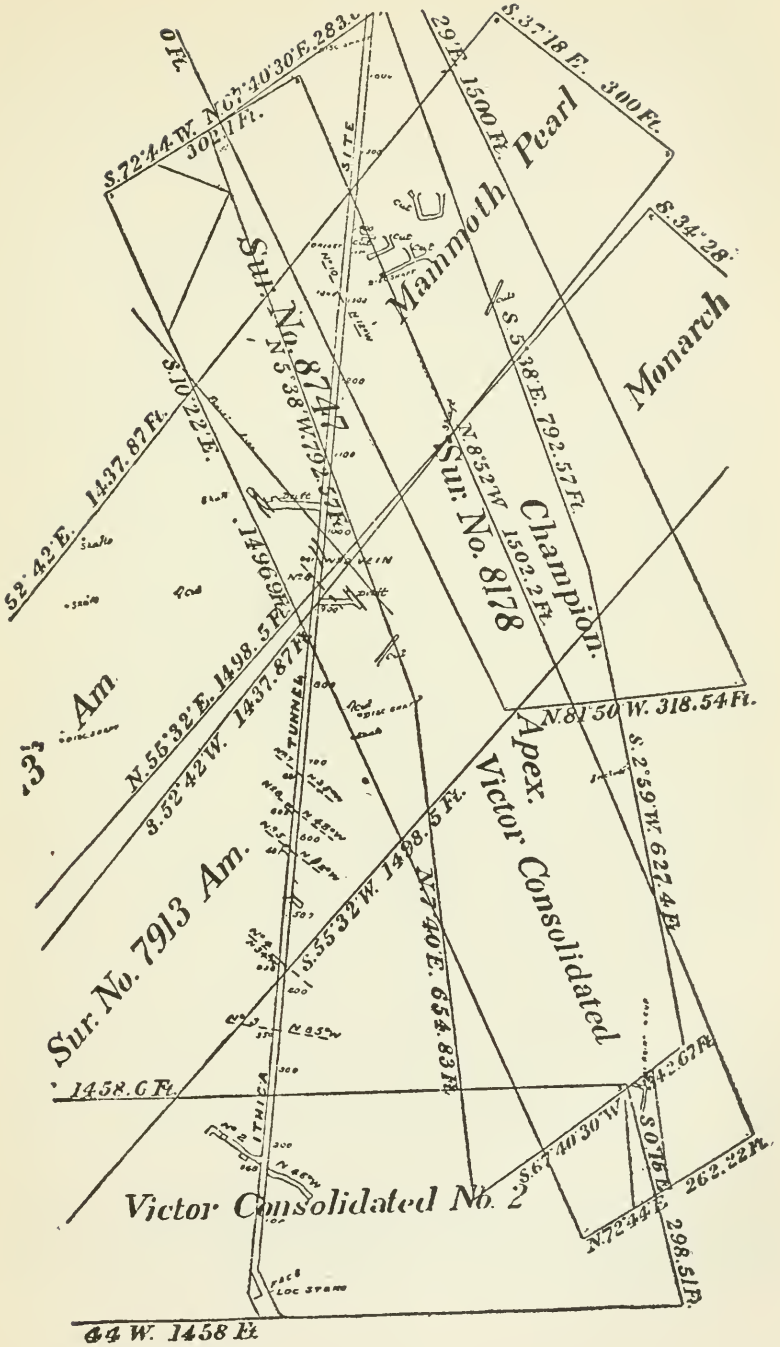
"Sec. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The especial controversy is whether the rights conferred by § 2322 are subject to the right of way expressed in § 2323, and limited by § 2336. Or, in other words, as to the latter section, whether by giving to the oldest or prior location, where veins unite, "all ore or mineral contained within the space of intersection," and "the vein below the point of union," the prior location takes no more, notwithstanding that § 2322 gives to such prior location "the exclusive right of possession and enjoyment of all the surface included within the lines" of the location, "and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

The defendant in error denied such effect to §§ 2323 and 2336, and brought this suit, as we have said, against plaintiff in error for damages and to restrain plaintiff in error from removing ore claimed to be within the boundaries of the claims of defendant in error, to which ore defendant in error claimed to be entitled by virtue of § 2322. The judgment of the lower court sustained the claim of the defendant in error, and damages were awarded it, and the plaintiff in error was enjoined from further prosecuting work. An appeal was taken to the supreme court of the state, and the judgment was affirmed. Thereupon this writ of error was allowed.

The annexed plat exhibits the relative location of the respective properties of the parties. The Champion location was dropped from the case. There is no controversy as to the validity of the respective locations, none as to the tunnel site or of the steps necessary to preserve it. Indeed, the facts are all stipulated, and that the respective locations are evidenced by patents, the defendant in error being the owner of the Monarch and the Mammoth Pearl, and the plaintiff in error the owner of the Victor Consolidated and the tunnel site. The facts are stated by the supreme court of the state as follows:

"That each of appellee's claims was located prior to either the lode claim or tunnel site of appellant; that the receiver's receipt on each of the claims of appellee issued prior to the location of the tunnel site and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the apex issued prior to the location of the tunnel site and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins in the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee and ore of the value of $400 removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated excludes the surface in conflict with the claims of appellee and all veins having their apex within such conflict, which are the same exceptions contained in the receiver's receipt for that claim; that the portal to the Ithaca tunnel site was at the date of its location on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithaca tunnel site, and blind veins discovered therein underneath the claims of appellee, are vested in appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel


0 Ft.
S. 72° 44' W. N. 67° 10' 30" E. 283.6
30[illegible] Ft.
S. 37° 18' E. 300 Ft.
29 Ft. 1500 Ft.
Pearl
Mammoth
S. 34° 28'
Monarch
Sur. No. 8178
S. 5° 38' E. 792.57 Ft.
N. 8° 32' W. 1502.2 Ft.
Champion
S. 10° 22' E.
S. 52° 42' E. 1437.87 Ft.
1496.0 Ft.
N. 55° 32' E. 1498.5 Ft.
S. 52° 42' W. 1437.87 Ft.
3 Am.
N. 8° 50' W. 318.54 Ft.
Apex.
Victor Consolidated
S. 2° 59' W. 627.4 Ft.
Sur. No. 7913 Am.
S. 55° 32' W. 1498.5 Ft.
N. 7° 40' E. 654.83 Ft.
1458.6 Ft.
S. 67° 40' 30" W.
S. 7° 15' E.
262.22 Ft.
N. 72° 44'
298.51 Ft.
Victor Consolidated No. 2
44 W. 1458 Ft

site mineral in place had not been discovered on the Monarch and Mammoth Pearl lode claims."

The assignments of error present the following proposition, which it is stipulated the case involves and to which the decision may be directed:

"First. Whether or not the Ithaca tunnel (the tunned claimed by plaintiff in error) is entitled to a right of way through defendant in error's lode claims.

"Second. Whether or not plaintiff in error has acquired by virtue of said tunnel-site location the ownership and right to the possession of the blind veins cut therein, to wit, veins or lodes not appearing on the surface and not known to exist prior to the date of location of said tunnel site.

"Third. Whether or not plaintiff in error is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim, within the surface boundaries and across lode claims of defendant in error.

"Fourth. Whether or not plaintiff in error should have been allowed to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of defendant in error prior to the location of said tunnel site."

The third proposition involves the relation of §§ 2322 and 2336. It is first discussed by plaintiff in error, and is given the most prominence in the argument, and we therefore give it precedence in the order of discussion. It presents for the first time in this court the rights of a junior location of a cross vein within the side lines of a senior location under § 2336. Prior to the decision by the supreme court of Colorado in the case at bar that court had decided that the junior location was entitled to all of the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins. *Branagan* v. *Dulaney* (1885) 8 Colo. 408, 8 Pac. 669; *Lee* v. *Stahl* (1886) 9 Colo. 208, 11 Pac. 77; *Morgenson* v. *Middlesex Min. & Mill. Co.* (1887) 11 Colo. 176, 17 Pac. 513; *Lee* v. *Stahl,* 13 Colo. 174, 22 Pac. 436. In *Coffee* v. *Emigh,* (1890) 15 Colo. 184, 10 L. R. A. 125, 23 Pac. 83, it was held that the rule laid down in the foregoing cases had become established law. The claims of the plaintiff in error were located after the decisions, and it is contended that the rule laid down by them became a rule of property in the state, and it is earnestly urged that to reverse the rule now would take from plaintiff in error that which it "had reason to believe was a vested right in the Victor Consolidated vein."

There are serious objections to accepting that consequence as determinative of our judgment. We might by doing so confirm titles in Colorado, but we might disturb them elsewhere. The statute construed is a Federal one, being a law, not only for Colo-

rado, but for all of the mining states, and therefore, a rule for all, not a rule for one, must be declared. Besides, what consideration should have been given to prior cases, the supreme court of the state was better able to judge than we are. It may be that the repose of titles in the state was best effected by the reversal of the prior cases. At any rate, a Federal statute has more than a local application, and until construed by this court cannot be said to have an established meaning. The necessity of this is illustrated, if it need illustration, from the different view taken of §§ 2322 and 2336 in California, Arizona, and Montana, from that taken in the prior Colorado cases. The supreme courts respectively of those states and that territory have adjudged a superiority of right to the cross veins to be in the senior location. Manifestly, on account of this difference, if for no other, this court must interpret the sections independently of local considerations. And in doing so we do not find in the sections much ambiguity so far as the issue raised by the record is concerned; indeed, not even much necessity for explanation. Section 2336 does not conflict with § 2322, but supplements it. Section 2336 imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given the senior location. It gives a right of way to the junior location. To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the supreme courts of California, Arizona, and Montana, or through the space of intersection of the claims, as held by the supreme court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct, and therefore the contention of the plaintiff in error is not correct, and, more than that, it is not necessary to decide on this record. A complete interpretation of the sections would, of course, determine between those views, but on that determination other rights than those submitted for judgment may be passed upon, and we prefer therefore to reserve our opinion.

There was some contrariety of views in the cases on other points. There was discussion as to whether veins cross on their strike or their dip, and it was held that they could cross on both strike and dip, but as to the exact application of § 2336 to either there was some disagreement.

The supreme court of Arizona said: "Congress had in mind, at the time of the enactment of the law of 1872, that, as mining rights then stood, A's lode might legally cross B's lode on the strike, and whether on the dip or not, makes no difference; and § 2336 was designed to define the rights of A and B in the space of intersection." *Watervale Min. Co.* v. *Leach,* 33 Pac. 418.

The supreme court of California held in *Wilhelm* v. *Sylvester,* 101 Cal. 358, 35 Pac. 997, that the provisions of the section could readily be construed as intending to protect the rights of old ledge locations; and, speaking of veins intersecting on their dip, said: "Moreover,

there is strong reason for thinking that such an intersection was the very one in the mind of Congress when it passed § 2336; for in that section, and speaking of the same subject, it says that 'where two or more veins *unite,* the oldest or prior location shall take the vein *below* the point of union,' and if the other kind of intersection [on the strike] was in the minds of the legislators at that time they would not have used the word 'below'; for 'below' would not apply at all to a union on the strike of two veins, such as the appellant's rights depend on in the case at bar." But the chief justice of the state, concurring in the result, observed:

"I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of § 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins which intersect upon their strike without bringing it in conflict with the plain terms of § 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the state courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent."

The supreme court of Colorado concurred in the conclusions of the courts of Arizona and California, and expressed its own view as follows:

"Our conclusion is that the provisions of § 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each, and in so far as § 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of § 2322."

See, for the views of the supreme court of Montana, *Pardee* v. *Murray,* 4 Mont. 234, 2 Pac. 16.

2. The other assignments of error relate to rights claimed by plaintiff in error by the location of the tunnel site, and present the questions whether such location gave to the plaintiff in error the following rights: Of way through the lode claims of the defendant in error; of possession of the blind veins cut by the tunnel underneath the claims of the defendant in error.

The plaintiff in error asserts the right of way for its tunnel under § 2323 by implication, and from that implication, and the rule it

contends for as to cross veins, deduces its right to all of the blind veins. The contention as to cross veins we have answered, and the deduction as to blind veins is not justified. The section contemplates that tunnels may be run for the development of veins or lodes, for the discovery of mines, gives a right of possession of such veins or lodes, if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid. There is no implication of a displacement of surface locations made before the commencement of the tunnel. Indeed, there is a necessary implication of their preservation. And there can be no implication of a conflict with the rights given by § 2322. The exclusiveness of those rights we have declared. The tunnel can only be run in subordination to them. How else can § 2322 be given effect? There are no exceptions to its language. The locators "of any mineral veins, lode, or ledge" are given, not only "an exclusive right of possession and enjoyment" of all the surface included within the lines of their locations, but *"of all veins, lodes, and ledges throughout their entire depth,* the top or apex of which lies inside of such surface lines extended downward vertically." A locator therefore is not confined to the vein upon which he based his location and upon which the discovery was made. "All veins or lodes having their apices within the plane of the surface lines extended downward are his, and possession of the surface is possession of all such veins or lodes within the prescribed limitations." Barringer & Adams, Mines & Mining, page 44.

Under the old law the miner "located the *lode.* Under the new [the act of 1872] he must locate a piece of land containing the top or apex of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top or apex of the vein. If he makes such a location, containing the top or apex of his discovered lode, he will be entitled to all other lodes having their tops or apices within their surface boundaries." Lindsay, Mines, § 71.

And this court said, speaking by Mr. Justice Brewer, in *Campbell* v. *Ellet,* 167 U. S. 116, 42 L. ed. 101, 17 Sup. Ct. Rep. 765:

"But the patent is not simply a grant of the vein, for, as stated in the section, 'a patent for any land claimed and located for valuable deposits may be obtained in the following manner.' It must also be noticed that § 2322, in respect to locators, gives them the exclusive right of possession and enjoyment of all the surface within the lines of their locations, and all veins, lodes, and ledges, the tops or apices of which are inside such lines. So that a location gives to the locator something more than the right to the vein which is the occasion of the location." See also *Del Monte Min. & Mill. Co.* v. *Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

The only condition is that the veins shall apex within the surface

lines. It is not competent for us to add any other condition. Blind veins are not excepted, and we cannot except them. They are included in the description "all veins" and belong to the surface location.

3. The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defendant in error, so far as the right of way is based on the statutes of the United States. So far as it is based on the statutes of Colorado it is disposed of by their interpretation by the supreme court of Colorado, and, expressing it, the court said:

"It is contended by counsel for appellant that, under § 2338, Rev. Stat. U. S. and § 3141, Mills's Anno. Stat. it is entitled to such right. The first of these sections provides that in the absence of necessary legislation by Congress the legislature of a state may provide rules for working mines involving easements, drainage, and other necessary means to their complete development, and that these conditions shall be fully expressed in the patent. The section of Mills referred to provides that a tunnel claim located in accordance with its provisions shall have the right of way through lodes which may lie in its course, but it will be observed that this section only refers to tunnels located for the purposes of discovery, and if any of its provisions are still in force,—which appears to be doubted in *Ellet* v. *Campbell,* 18 Colo. 510, 33 Pac. 521,—they can have no application to the case at bar, because the section of the Revised Statutes only provides for easements for the development of mines, and the section of Mills relied upon does not attempt to confer any such rights, but is limited to the one purpose of discovery. In this respect it has been clearly superseded by the act of Congress, so that if appellant is entitled to the right claimed it must attach by virtue of some provision of this act."

4. An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca tunnel site no ore had been discovered in two of the patented claims of the defendant in error, to wit, the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary.

Judgment affirmed.

CREEDE & CRIPPLE CREEK MINING & MILLING COMPANY, *Petitioner*, v. UINTA TUNNEL MINING & TRANSPORTATION COMPANY.

1905. SUPREME COURT OF THE UNITED STATES.
196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. 266.

MR. JUSTICE BREWER delivered the opinion of the court:[2]

Certiorari to review a judgment of the United States circuit court of appeals for the eighth circuit (57 C. C. A. 200, 119 Fed. 164), reversing a judgment of the circuit court of the United States, rendered upon a verdict of a jury, directed by the court.

The action was originally brought by the Creede & Cripple Creek Mining & Milling Company, as plaintiff, against the Uinta Tunnel Mining & Transportation Company, as defendant, in the district court of the county of El Paso, Colorado, for the possession of certain mining claims, and for damages. Equitable relief was also prayed. On motion of the defendant the action was removed to the United States circuit court for the district of Colorado, where, also on its motion, the pleadings were reformed, and the action made one for the possession of the property, and damages.

The plaintiff filed an amended complaint, alleging in substance that it was the owner in fee and in possession, and entitled to the possession, of the Ocean Wave and Little Mary lode mining claims, being survey lot No. 8192, evidenced by mineral certificate No. 338, the patent of the United States to said plaintiff for said claims bearing date December 21, 1893; that said claims were duly located and discovered on the 2d of January, 1892, and that the patent related back and took effect of that date for all purposes given and provided by the laws of the United States and the state of Colorado concerning mining claims.

Entry upon the claims and ouster of plaintiff by defendant by means of its tunnel were also alleged.

Thereafter the defendant filed its answer. Upon motion of plaintiff certain portions thereof were stricken out, and on the trial testimony offered by the defendant in support of the portions stricken out was rejected.

The matter to be determined is the sufficiency of the defenses pleaded and stricken out. To appreciate them fully it is well to state some facts about which there is no dispute, and it is sufficient to state the facts in reference to one of the lode mining claims, as the proceedings in respect to the two were alike. On February 1, 1892, J. B. Winchell and E. W. McNeal filed in the office of the county clerk of El Paso county (the county in which the mining claim was situated) a certificate of location which, not verified by affidavit or

[2] Parts of the opinion are omitted.

other testimony, stated that they had, on January 2, 1892, located and claimed, in compliance with the mining acts of Congress, 1,500 linear feet on the Ocean Wave lode, and gave the boundaries of the claim. By several mesne conveyances the title of Winchell and McNeal passed to the plaintiff. On August 5, 1893, the plaintiff made an entry of the claim in the proper land office of the United States, and, no proceedings in adverse being instituted, a patent therefor was issued to it on December 21, 1893. There is no reference in the patent to the discovery or the filing of the location certificate. The first appearance of the claim on the records of any office of the United States is the entry in the local land office of August 5, 1893, and the only prior record in any state office is the location certificate, unsworn to, filed February 1, in which the parties filing the certificate stated that they had discovered the lode on January 2, 1892. On February 25, 1892, a location certificate of the defendant's tunnel was filed in the office of the county clerk of El Paso county, which, verified by the oath of one of the locators, stated that on January 13, 1892, thay had located the tunnel site by posting in a conspicuous place and at the entrance to the tunnel a notice of their intent to claim and work the tunnel; that they had performed work therein to the value of $270 in driving said tunnel, and $80 in furnishing and putting in timbers, and that it was their bona fide intent to prosecute the work with diligence and dispatch for the discovery of lodes and for mining purposes. The certificate also contained a full description of the boundaries of the tunnel site as claimed.

In a general way it may be said that the defenses which were stricken out were a priority of right and an estoppel. * * *

Was there error in striking out the defenses? * * *

It does not appear from the answer or testimony that the tunnel had reached the boundaries of the plaintiff's claims prior to the entry or even prior to the patent. For the purpose of this case, therefore, we must assume that, although its line had been marked out,—a line extending through the plaintiff's ground,—yet in fact no work had been done within such ground prior to the patent.

The propositions upon which the plaintiff relies are that discovery is the initial fact; that the patent when issued relates back to that initial fact and confirms all rights as of that date; that no inquiry is permissible as to the time of that discovery, it being concluded by the issue of the patent; that such time antedated anything done in or for the tunnel; that no adverse proceedings were instituted after it had applied for patent, and that, therefore, its rights became vested in the ground, the same right which any other landowner has, and which could not be disturbed by the defendant by means of its tunnel. *St. Louis Min. & Mill. Co.* v. *Montana Min. Co.* 194 U. S. 235, 48 L. ed. 953, 24 Sup. Ct. Rep. 654.

On the other hand, defendant contends that, as the first record in any office of the government was the record of the entry on August

5, 1893, the patent issued in an *ex parte* proceeding is conclusive only that every preceding step, including discovery, had then been taken; that it in fact located its tunnel site prior to any discovery or marking on the ground of plaintiff's claim; that it was not called upon to adverse plaintiff's application for a patent, because no patent is ever issued for a tunnel, and it had not then discovered any veins within its tunnel; that plaintiff, with full knowledge of defendant's tunnel location, permitted the driving of the tunnel through its ground and beyond, at an expenditure of $135,000, and made no objection until the discovery of the veins beyond its ground, and then, for the first time, and to prevent defendant from developing such veins, brought this action, and that by such acquiescence it was now estopped to question defendant's use of the tunnel.

Obviously the parties divide as to the effect of plaintiff's patent. The circuit court held with the plaintiff, the court of appeals with the defendant. It may be conceded that a patent is conclusive that the patentee has done all required by law as a condition of the issue; that it relates to the initiation of the patentee's right, and cuts off all intervening claims. It may also be conceded that discovery of mineral is the initial fact. But when did the initial fact take place? Are all other parties concluded by the locator's unverified assertion of the date or the acceptance by the government of his assertion as sufficient, with other matters, to justify the issue of a patent? Undoubtedly, so far as the question of time is essential to the right, the patent is conclusive, but is it beyond that?

In order to reach a clear understanding of the question it seems necessary to consider the legislation. Three things are provided for: discovery, location, and patent. The first is the primary, the initial fact. The others are dependent upon it, and are the machinery devised by Congress for securing to the discoverer of mineral the full benefit of his discovery. * * *

Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By § 2324 (U. S. Comp. Stat. 1901, p. 1426), however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the state or territory within which the district is situated. This is held to authorize legislation by the state. * * *

And many territories and states (Colorado among the number) have made provisions in respect to the location other than the mere marking on the ground of the boundaries of the claim. So, before a location in those states is perfected, all the provisions of the state statute as well as of the Federal must be complied with, for location there does not consist in a single act. * * *

Returning now to the matter of location, the Colorado statutes in substance require—

"1. To place at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator, and the date of the discovery.

"2. Within sixty days from the discovery, to sink a discovery shaft 10 feet deep, showing a well-defined crevice.

"3. To mark the surface boundaries by six posts, one at each corner and one at the center of each side line, hewed or marked on the side or sides in towards the claim.

"4. The disclosure of the lode in an open cut, cross cut, or tunnel suffices instead of a 10-foot shaft.

"5. Within three months from date of discovery he must file a location certificate with the county recorder giving a proper description of the claim, and containing also the name of the lode, the name of the locator, the date of the location, the number of feet in length on each side of the center of the discovery shaft, and the general course of the lode." Morrison, Mining Rights, 11th ed. p. 59.

The issue of a patent for a lode claim in Colorado is therefore not only a conclusive adjudication of the fact of the discovery of the mineral vein, but also of compliance with these several provisions of its statutes. The supreme court of that state has decided that the order is not essential, providing no intervening rights have accrued. In *Brewster* v. *Shoemaker*, 28 Colo. 176, 180, 53 L. R. A. 793, 798, 89 Am. St. Rep. 188, 190, 63 Pac. 309, 310, it said:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided, only, all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or file a new one."

And that has been the general doctrine. * * *

But what is the meaning of the statute? Its language is "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Does that require that a discovery must be made before any marking on the ground, especially when, as under the Colorado statutes, several other steps in the process of location are prescribed, or does it mean that no location shall be considered as complete until there has been a discovery? Bearing in mind that the principal thought of the chapter is exploration and appropriation of mineral, does it mean anything more than that the fact of discovery shall exist prior to the vesting of that right of exclusive possession which attends a valid location?

This may be looked at in another aspect. Suppose a discovery

is not made before the marking on the ground and posting of notice, but is then made, and it and all other statutory provisions are complied with before the entry, which is an application for the purchase of the ground,—of what benefit would it be to the government to require the discoverer to repeat the marking on the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done which, under the law, ought to be done to entitle the party to purchase the ground, wherein is the government prejudiced if the precise order of those acts is not followed? Or, to go a step farther, suppose, on an application for a patent, an adverse suit is instituted, and on the trial it appeared that the plaintiff in that suit had made a discovery and taken all the steps necessary for a location in the statutory order, although not until after the applicant for the patent had done everything required by law, would there be any justice in sustaining the adverse suit, and awarding the property to the plaintiff therein, on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did not precede the location?

These suggestions add strength to the concurring opinion of three leading commentators on mining law, the general trend of the rulings of the [land] department and decisions of the courts, to the effect that the order in which the several acts are done is not essential, except so far as one is dependent on another. Doubtless a locator does not acquire the right of exclusive possession unless he has made a valid location, and discovery is essential to its validity; but if all the acts prescribed by law are done, including a discovery, is it not sacrificing substance to form to hold that the order of those acts is essential to the creation of the right? It must be remembered that the discovery and the marking on the ground are not matters of record but *in pais*, and, if disputed in an adverse suit or otherwise, must be shown, as other like facts, by parol testimony. It must also be remembered that the certificate of location required by the Colorado statutes need not be verified. The one in this case was not. A locator might, if so disposed, place the date of discovery before it was in fact made, and at any time within three months prior to the filing of the certificate. * * *

It would seem, therefore, * * * that, as between the government and the locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, and that if, at the time of the entry, everything had been done which entitled the party to an entry, to wit, a discovery and a perfected location, the government would not be justified in rejecting the application on the ground that the customary order of procedure had not been followed. In other words, the government does not, by accepting the entry, and confirming it by a patent, determine as to the order of proceedings prior to the entry, but only that all required by law have been taken.

If, therefore, the entry and patent do not of themselves necessarily determine the order of the prior proceedings, why may not anyone who claims rights anterior to the entry, and dependent upon that order, show, as a matter of fact, what it was? One not a party to proceedings between the government and the patentee is concluded by the action of the government only so far as that action involves a determination. There is a determination by the fact of entry and patent that there was, prior to the entry, a discovery and a location. Having been so determined, third parties may be concluded thereby.

But it may be said that when the time of a particular fact is concluded by an adjudication, or when an opportunity is presented for such an adjudication, and not availed of, the time as stated must be considered as settled; that when the plaintiff applied for its patent, if there was any question to be made by the defendant of any statement of fact made in the location certificate or other record, it should have been challenged by an adverse suit. Failing to do so, the fact must be considered to be settled as stated. Undoubtedly, if, in an adverse suit, the time of any particular matter is litigated, the judgment is conclusive; and if the date of discovery stated in the plaintiff's location certificate had been challenged in an appropriate action brought by the defendant, and determined in favor of the plaintiff, there could be now no inquiry. So, when the owner of a lode claim makes application for a patent, and the owner of another seeks to challenge the former's priority of right on account of the date of discovery, it is his duty to bring an adverse suit; and, if he fails to do so, that question will be, as to him concluded. Such is the purpose and effect of the adverse proceedings.

Is the same rule also applicable to a tunnel site? This opens up the question of what are the rights and obligations of the owner of a tunnel. And here these facts must be borne in mind: The owner of a tunnel never receives a patent for it. There is no provision in the statute for one, and none is in fact ever issued. No discovery of mineral is essential to create a tunnel right or to maintain possession of it. A tunnel is only a means of exploration. As the surface is free and open to exploration, so is the subsurface. The citizen needs no permit to explore on the surface of government land for mineral. Neither does he have to get one for exploration beneath the surface for like purpose. Nothing is said in § 2323 (U. S. Comp. Stat. 1901, p. 1426) as to what must be done to secure a tunnel right. That is left to the miners' customs or the state statutes, and the statutes of Colorado provide for a location and the filing of a certificate of location. When the tunnel right is secured the Federal statute prescribes its extent,—a tunnel 3,000 feet in length and a right to appropriate the veins discovered in such tunnel to the same extent as if discovered from the surface.

If the tunnel right was vested before a discovery in the plaintiff's lode claim the defendant ought to have the benefit of it. The plain-

tiff's right does not antedate his discovery; at least it does not prevail over any then-existing right. But, it is said, the defendant did not adverse the plaintiff's application for a patent; that its omission so to do precludes it from now asserting a right prior to the date of discovery named in the certificate of location, just as a judgment in an adverse suit involving the question of date would have been conclusive. Is the owner of a tunnel who simply seeks to protect his tunnel, and has, as yet, discovered no lode claim, bound to adverse an application for the patent of a lode claim, the lode of which was discovered on the surface? It is contended that the case of *Enterprise Min. Co.* v. *Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, decides this question. But in that case the line of the tunnel did not enter the ground of the lode claim, but ran parallel with and distant from it some 500 feet, and we held that the mere possibility that, in the line of the tunnel, might be discovered a vein which extended through the ground of the distant lode claim, did not necessitate adverse proceedings. Here the line of the tunnel runs directly through the ground of the plaintiff, and the question is distinctly presented whether, in order to protect the right to that tunnel, the defendant was called upon to adverse? Whatever might be the propriety or advantage of such action, the statute does not require it.

Sections 2325 and 2326 (U. S. Comp. Stat. 1901, pp. 1429, 1430) provide the manner of obtaining a patent and for adverse proceedings. The first commences: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner." This, obviously, does not refer to easements or other rights, nor the acquisition of title to land generally, but only to land claimed and located for valuable deposits. Then, after prescribing certain proceedings, the statute adds: "If no adverse claim shall have been filed with the register . . . it shall be assumed that the applicant is entitled to a patent . . . and that no adverse claim exists." The next section commences, "where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim." The section then authorizes the commencement of an action by the adverse claimant and a stay of proceedings in the Land Department pending such action, and adds:

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to

the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

Reading these two sections together, it is apparent that they provide for a judicial determination of a controversy between two parties contesting for the possession of "land claimed and located for valuable deposits;" in other words, the decision of a conflict between two mining claims,—a decision which will enable the Land Department, without further investigation, to issue a patent for the land. A tunnel is not a mining claim, although it has sometimes been inaccurately called one. As we have seen, it is only a means of exploration. The owner has a right to run it in the hope of finding a mineral vein. When one is found he is called upon to make a location of the ground containing that vein, and thus creates a mining claim, the protection of which may require adverse proceedings. As the claimant of the tunnel he takes no ground for which he is called upon to pay, and is entitled to no patent. A judgment in adverse proceedings instituted by him (if such proceedings were required) might operate to create a limitation on the estate of the applicant for a patent to the mining claim, and, thus as it were, engraft an exception on his patent. But, taking the whole surface, the applicant is required to pay the full price of $5 per acre, with no deduction because of the tunnel. The statute provides for no reduction on account of any tunnel. The tunnel owner might be said to have established his right to continue the tunnel through the lode claim after patent,—a right which he undoubtedly had before patent, or at least before entry. There is no statutory warrant for placing in a patent to the owner of a lode claim any limitation of his title by a reservation of tunnel rights. In *Deffeback* v. *Hawke*, 115 U. S. 392, 406, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95, 101, we said:

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed."

Other limitations in the full title granted by a patent for a mineral claim are recognized in the statutes. Thus, by § 2339 (U. S. Comp.

Stat. 1901, p. 1437), which is found in the same chapter as the other sections quoted, the one devoted to "Mineral Lands and Mining Resources," it is provided that:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

But it has never been supposed that the owner of any of these rights was compelled to adverse an application for a patent for a mining claim, for they are not "mining claims."

The decisions on the question of the duty of the tunnel owner to adverse the application of the lode claimant are not harmonious. In *Bodie Tunnel & Min. Co.* v. *Bechtel Consol. Min. Co.* 1 Land. Dec. 584, Secretary Kirkwood held that a tunnel location was a mining claim and necessitated adverse proceedings to protect its rights as against an applicant for a lode claim (see also *Back* v. *Sierra Nevada Consol. Min. Co.* 2 Idaho, 420, 17 Pac. 83), while the supreme court of Colorado, in *Corning Tunnel Co.* v. *Pell*, 4 Colo. 507, denied the right of a tunnel owner to adverse the application for a patent for a lode claim where the lode had not been discovered in the tunnel, and the discovery shaft was not on the line of the tunnel. Lindley, § 725, referring to the decision in *Enterprise Min. Co.* v. *Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, said:

"In the light of this decision and the one which it affirms, the rule may be thus formulated: Where a lode claimant applies for a patent to a location embracing a lode which has previously been discovered in the tunnel, the tunnel claimant will be compelled to adverse to protect his rights. A right in the particular lode inures to the tunnel proprietor immediately upon its discovery in the tunnel, which right is essentially adverse to the lode applicant; but where there has been no discovery in the tunnel, and it cannot be demonstrated that the lode will be cut by the tunnel bore, there is no necessity for an adverse claim."

Without further review of the conflicting authorities, it would seem that whatever may be the propriety or advantage of an adverse suit, one cannot be adjudged necessary when Congress has not specifically required it. Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface. Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant.

If the defendant was not estopped by a failure to institute adverse

proceedings, then the trial court erred in striking out the parts of the answer in reference to the date of plaintiff's discovery, and the judgment of the court of appeals was right.

This conclusion avoids the necessity of any inquiry as to the effect of the alleged estoppel, and the judgment of the Circuit Court of Appeals is affirmed.

CHAPTER VI.

ANNUAL LABOR OR IMPROVEMENTS AND THE ABANDONMENT, FORFEITURE AND RESUMPTION OF WORK ON LODE AND PLACER CLAIMS.

Section 1.—The Annual Labor and Improvements Requirement.

FEDERAL STATUTE.

Sec. 2324. * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures. Rev. St. U. S. § 2324.[1]

(a) *Scope of State Legislation and of District Rules.*

NORTHMORE v. SIMMONS ET AL.

1899. CIRCUIT COURT OF APPEALS. 38 C. C. A. 211, 97 Fed. 386.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge.[2]—The appellant was the complainant in a bill in which he alleged that on January 9, 1897, he made a discov-

[1] "The annual expenditure to the amount of $100 required by section 2324, Revised Statutes, must be made upon placer as well as lode locations."—Land Office Mining Regulations, rule 25. For a decision to the same effect, see Carney v. Arizona G. M. Co., 65 Cal. 40, 2 Pac. 734.

[2] Parts of the majority opinion and parts of the dissenting opinion are omitted.

ery of mineral-bearing quartz in place in the Mojave mining district, in the state of California, and that he duly located the same; that there was a mining regulation in said mining district which provided that, "within ninety days of location, a shaft shall be sunk or a tunnel run to a depth of not less than ten feet from the apex of the ledge of mineral-bearing quartz; otherwise, the claim shall be subject to relocation"; that upon April 10, 1897, the defendants entered upon the complainant's said claim, and took possession thereof and located the same, contending that the complainant's rights were forfeited by reason of his failure to comply with the said mining regulation." On a demurrer to the bill for want of equity, the bill was dismissed. The sole question presented upon the appeal is whether the regulation of the Mojave mining district requiring certain work to be done within 90 days after location is valid. * * *

We are of the opinion that section 2324 [Rev. St. U. S.] was intended to prescribe the minimum amount of expenditure in labor or improvements which was exacted by the United States within a maximum period, and to leave to state legislatures or local mining districts the power to make such reasonable regulations as they might deem advisable, within the prescribed limit; such regulations to be always subject to the provision of the statute that at least the expressed yearly amount in work or improvement must be expended upon the claim, and that, at most, the time for expending the same shall not be extended beyond the designated year. This, we think, is clearly implied in the language of the statute. Miners are therein authorized to make regulations governing the "amount of work necessary to hold possession of a mining claim." The amount of work can be regulated only by increasing or diminishing it. The diminution of it is expressly prohibited. There shall be "not less than one hundred dollars' worth" per annum. It follows that the miners may regulate the amount by increasing it. If the amount may be increased above that which is required by the statute of the United States, no reason is perceived why the time may not be abridged within which a portion of it is to be done, or why any other reasonable regulation may not be required to be complied with within a shorter time than a year. The statute of the United States exacts no discovery shaft, nor any work, as a condition to the location of a claim, or the initiation of the right of a locator. The right of a state legislature to impose such additional work has uniformly been recognized. No difference in principle is discernible between the requirement that such discovery work shall be made as an incident to the location, and the requirement that after location it shall be made as a condition to the subsistence of the same. In either case burdens are imposed upon the locator in addition to the "requirements" of the United States statute. In neither case is the requirement that a shaft be sunk, whether it be denominated a "discovery shaft," or whether it be known by any other name, in conflict with the express

provisions of that statute. The statute was not intended to interfere with the rights of the states or of the local mining districts. It was intended to express the most liberal terms on which the United States would part with its right in mining claims. No state legislature nor local mining regulation may grant more favorable terms than those which are demanded by the statute. It contains the full extent of the "requirements" of the United States. There shall be expended upon the claim at least $100 per annum. No limit is placed upon the amount of work above $100 which may by local mining rule be required from the locator. To provide that the assessment work shall be $200 per annum is not in conflict with the statute; neither is there a conflict if one-half of that amount of work be required within one-half of the time. In Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, the supreme court recognized the validity of a statute of Colorado (Gen. Laws Colo. 1877, p. 630) declaring that one of the essential acts of locating a claim should consist in sinking a discovery shaft upon the lode. * * *

A decision directly in point is that of the supreme court of Nevada in the recent case of Sissons v. Sommers, 55 Pac. 829, in which the court had under consideration the provisions of the act of the legislature of that state (Laws 1897, p. 103). The first section of the act prescribed the method of locating a mining claim. It declared that it should consist (1) in "defining the boundaries of the claim in the manner hereinafter described," and (2) "posting a notice of such location at the point of discovery." The second section provided that before the expiration of 90 days from the posting of the notice "the locator must sink a discovery-shaft upon the claim located to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode deposit in place." It was a provision identical with the regulation of the Mojave mining district which is involved in this case, in that it required the act to be done within 90 days after location. The court, in a carefully considered opinion, said:

> "We think the legislature may require a reasonable additional amount of work to be done annually, and a reasonable amount of work to complete the location, or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by congress for the annual expenditure, as a condition to the continuance of the right acquired by the location of the mine."

The appellant relies upon Sweet v. Webber, 7 Colo. 443, 4 Pac. 752, and Original Co. of W. & K. v. Winthrop Min. Co., 60 Cal. 631. The first case goes no further than to hold that neither by a rule of miners nor by a state statute can a location be maintained upon the expenditure of less than $100 per annum, as required by the United States statutes,—a proposition that is not disputed and is

not involved in this case. The second case holds that a local regulation providing for forfeiture of a claim upon the failure of the locator to perform some work upon it every 60 days was in conflict with the law of congress, and therefore void. The reasoning upon which this conclusion is reached is not stated in the opinion. It is opposed, not only to what we conceive to be the plain meaning of the statute, but to the weight of authority. Certain decisions are also cited, such as Belk v. Meagher, 3 Mont. 65, which sustain the proposition that a mining claim may not be forfeited until the expiration of the period which congress has fixed for the performance of the annual assessment work, but they are all cases in which the law of the United States alone was involved. In none of them was there a question of rights under a state law or a miners' regulation, and in none of them was the question which is now before the court even remotely involved. Their inapplicability to the present discussion is too apparent to require further comment. We find no error in the ruling of the circuit court, and the decree will be affirmed.

Ross, Circuit Judge (dissenting). * * *

The validity of this local rule is the sole question in the case. It is conceded in the opinion of the majority of this court that a similar rule was held invalid by the supreme court of California in the case of Original Co. of W. & K. v. Winthrop Min. Co., 60 Cal. 631; but the prevailing opinion disapproves that decision, and declares it to be not only contrary to "the plain meaning of the statute [of the United States], but to the weight of authority." In my judgment, the exact reverse is true. The decision of the supreme court of California thus criticised and disapproved gives force and effect to the federal statute, and holds invalid a local rule of a mining district inconsistent therewith. This is not only in accord with the express language of the United States statute itself, and with the text writers, but with every decision of the courts that has come under my observation. Not a single decision cited and relied upon in the prevailing opinion, in my judgment, at all supports the conclusion therein announced; and with the exception of some dicta taken from the latter portion of the opinion of the supreme court of Nevada in the case of Sissons v. Sommers, 55 Pac. 829, there is nothing in the language of any of them that gives any support to the conclusion reached by the majority of this court. The federal statute, as has been shown, fixes the 1st day of January succeeding the date of the location as the commencement of the year within which the required work shall be done. The location here in question having been made on the 9th day of January, 1897, the time thus fixed by the legislation of congress within which the locator was required to perform at least $100 worth of work or make $100 worth of improvements commenced on the 1st day of

January, 1898, and extended for the period of one year. Yet the local rule of the mining district in question declares forfeited the rights of the locator unless within 90 days after making his location a shaft be sunk or a tunnel run to a depth of not less than 10 feet from the apex of the ledge of mineral-bearing quartz; and this forfeiture the defendants to the present suit asserted, and it is now sustained by this court. Thus, by a local rule of the mining district, the locator's rights to the claim that he located in all respects in accordance with the law is declared forfeited before the commencement of the period fixed by the act of congress within which the annual assessment work is required to be done. It is difficult to see how there could be any greater inconsistency between two rules than is here shown. * * * Nothing can be plainer, in my opinion, than that the time fixed by congress for the performance of the work and improvements it requires cannot be taken away, shortened, or in any way modified by any state legislation, or by any local rule or regulation of a mining district. To the extent that congress legislates on the subject, its act is binding and controlling. The acts of congress, however, in express terms authorize state legislation and the making of local rules and regulations by the various mining districts not inconsistent with its own act. For example, congress not having declared what should constitute a "discovery" of a mineral-bearing vein or lode, or the character or extent of the work necessary to be done to disclose such vein or lode in place, it is entirely competent for the states to legislate upon that subject, and for the various mining districts to make rules and regulations in respect thereto not inconsistent with federal or state law. * * *

The discovery shaft and the various equivalents provided for by the several state enactments constitute a part of the process of location (Morr. Min. Rights [8th Ed.] p. 27; 1 Lindl. Mines [§ 343], supra), and, being consistent with the acts of congress, are valid, for the reason already stated. It was such an act that was the subject of consideration in Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560. * * *

In California there is no statute, nor was there any rule or regulation of the Mojave mining district, requiring any development work prior to, and as a condition of, a valid location. The bill in the present case shows that the complainant perfected his location. The annual work necessary to maintain and hold that location is an altogether different thing. This distinction is recognized and clearly pointed out by Mr. Lindley in sections 623 and 626, and the failure to observe it constitutes, in my judgment, the error in the opinion and judgment from which I dissent. The performance of this annual assessment work is called by the miners a "representation" of the mine, and, when performed for a given period, the mine is said to be "represented." Belk v. Meagher, 3

Mont. 65, 77; 2 Lindl. Mines, p. 775; Barringer & A. Mines & M., supra. Congress having legislated in respect to that annual assessment work, its provisions are paramount, and any and every thing that conflicts with them is void, be it a rule or regulation of a mining district or a statute of a state. For the reasons here given, I respectfully dissent from the opinion and judgment of the majority of the court.

(b) *What Will Serve as Annual Labor and Improvements.*

MATTINGLY ET AL. v. LEWISOHN.

1893. SUPREME COURT OF MONTANA. 13 Mont. 508, 35 Pac. 111.

ACTION by James P. Mattingly and others against Leonard Lewisohn to determine the right of possession to a quartz lode mining claim. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

HARWOOD, J.[3]—* * *

Lastly, instruction No. 6 is attacked as erroneous because the jury are thereby told that: "In estimating the amount of work or improvements, the test is the reasonable value thereof, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not said work or improvements were reasonably worth the sum of $100." In this connection, appellant's counsel argue that the "intrinsic value or worth of the property may be nothing at all. If the amount of labor put into it was worth $100, it is sufficient." We do not regard the language of the instruction fairly susceptible of a construction antagonistic to the view of appellant's counsel. Indeed, it seems to us that the court is in accord with them, in saying to the jury. "In estimating the amount of work or improvements, the test is the reasonable value thereof." The court here said to the jury, it is the reasonable value of the work or improvements which you must consider. The court certainly did not, in that instruction, say that the value of the claim, with such work or improvements thereon, or the value of the work or improvements to the claim, was the criterion for ascertaining whether the requirements of the law had been fulfilled; and we do not think a jury would be misled in construing or applying the language used by the court, especially in view of the fact that the evidence on that point is directed to the ascertainment of the value of the work or improvements put upon the mine, irrespective of the value of the mining claim, or the propriety or expediency of making the improvement

[3] The statement of facts and a part of the opinion are omitted.

or working it in the manner shown, or inquiring how much it enhanced the value of the claim. Upon careful consideration of these instructions, in the light of the criticism brought to bear on them by the learned counsel for appellant, we think, taken in connection with the other instructions given, they plainly and sufficiently state the law applicable to the case, as developed in the pleadings and evidence. The conclusion of this court, upon all the errors assigned, is that judgment of the court below, and the order overruling appellant's motion for a new trial, should be affirmed.

PROTECTIVE MINING CO v. FOREST CITY MINING CO.

1909. Supreme Court of Washington.

51 Wash. 643, 99 Pac. 1033.

Action by the Protective Mining Company against the Forest City Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Chadwick, J.[4]—* * *

3. It is clearly shown that appellant did not perform its assessment work for the year 1906 in the manner and to the value as required by law. It is true it paid the sum of $500 to parties whom it had no doubt employed in good faith, but who did no more than go upon the ground and make pretense of doing the work. This is not a compliance with the law. The work must be done as required in the federal statutes or a forfeiture results. It follows that respondent's possession was lawful.

The decree of the lower court is affirmed.

WAILES v. DAVIES et al.

1907. Circuit Court, D. Nevada. 158 Fed. 667.

Farrington, District Judge.[5]—* * *

5. The objection that extracting ore is not development work is entirely immaterial. The language of the statute is "on each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426]. Obviously the purpose of

[4] Part only of the opinion is given.
[5] Part only of the opinion is given.

this statute is to require the mine owner to evidence his good faith by performing $100 worth of labor on each claim each year until patent issues. The statute does not require any particular character of labor; it does not require that the work shall be wisely and judiciously done; nor does it say how the work shall be performed. The fact is, the better the mine, the greater the portion of labor which is devoted exclusively to the extraction of ore; and the ideal mine is one in which no prospecting or development work is necessary, where no work is required except the extraction of ore, and the depletion of the treasure, which is the sole value of the mine. If $100 worth of labor in the nature of mining is performed on a claim by the owner, whether the work is beneficial or not, there can be no forfeiture. The character of labor becomes material when it is performed without the boundaries of the claim. In that event, the labor must tend to the development or improvement of the mining claim for which it is designed, otherwise it will not count.

6. Complainant earnestly contends that this work was not done by or under the authority of the company; that Mr. Lay, in 1904, was neither an agent nor an officer of the company; that he had no intention of doing the assessment work, and consequently the work on the three claims cannot inure to the benefit of the company or defendant Davies. Mr. Lay testifies that he was neither an officer nor an agent of the Whalen Consolidated Copper Mining Company during 1904 and the three preceding years; that he had no authority from the company, and was on the ground simply as a stockholder representing himself. * * *

The federal act in relation to the performance of annual labor says nothing as to the person by whom it shall be performed. The obvious purpose of the law is to exact work as an evidence of good faith on the part of the owner, and also to discourage the holding of mining claims without development or intention to develop, to the exclusion of others who could and would improve such ground if they had opportunity. Manifestly, the annual work must be performed by the owner, at his instance, by some one in privity with him, or by some one who holds an equitable or beneficial interest in the property. Work by such a person will inure to the benefit of the claim. 2 Lindley on Mines, § 666; Jupiter Mg. Co. v. Bodie Con. Mg. Co. (C. C.) 11 Fed. 666; Book v. Justice Min. Co. (C. C.) 58 Fed. 106; Godfrey v. Faust, 18 S. D. 567, 571, 101 N. W. 718; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223, 225; Dye v. Crary (N. M.) 85 Pac. 1038, 9 L. R. A. (N. S.) 1136. * * *

It is undoubtedly the law, as complainant contends, that a corporation is an entity distinct from its stockholders, and holds its property absolutely as a natural person may. The stockholder by virtue of his ownership of the stock has no legal title to any of the property of the corporation. The deduction which complainant makes from this is

that assessment work on corporate property cannot be performed except by corporate action; that there can be no corporate action except by the trustees or directors acting formally as such, or by action of the officers of the company; that Lay, Shaw, and Leighton, when they performed work on the Prince of Wales, Amazon, and Copper Nut in 1904, though stockholders, were strangers to the title, and therefore trespassers, and consequently their work cannot inure to the benefit of the corporation. I cannot concur in these conclusions. There can be corporate action which is not formal corporate action. * * *

A stockholder is not altogether a stranger to the title to the corporate property. He has an equitable or beneficial interest therein. It is unnecessary to define that interest. It is sufficient to say the ownership of such an interest predicates a right in the owner to protect that interest; from this it follows that he has also the right to insist that the corporate property shall be protected from fraudulent, tortious, and wrongful injury, conversion, misappropriation, or destruction. Dodge v. Woolsey, 18 How. 331, 341, 15 L. Ed. 401; Wright v. Oroville Mg. Co., 40 Cal. 20, 27; 4 Thompson on Corp. § 4520; Helliwell on Corp. § 411. If the directors and officers of a mining company negligently or fraudulently failed to do the requisite representation work on the company's unpatented claims, and thereafter relocated the property for themselves, a court of equity at the instance of a stockholder would undoubtedly compel restitution of the property. It is difficult to see why work performed upon such claims by a stockholder who had peaceably entered thereon prior to forfeiture should not be counted as representation work, if performed at the proper time. These considerations lead me to conclude that a stockholder in a mining company has such a beneficial interest in the corporate property that any mining work done by him on the unpatented claims of the company must be counted as representation work. The work done by Mr. Lay on the Prince of Wales, Copper Nut, and Amazon in 1904 was sufficient to protect those claims from forfeiture and relocation. * * *[5a]

COPPER MOUNTAIN MINING & SMELTING CO. v. BUTTE & CORBIN CONSOL. COPPER & SILVER MINING CO.

1909. Supreme Court of Montana. 39 Mont. 487, 104 Pac. 542.

Action by the Copper Mountain Mining & Smelting Company against the Butte & Corbin Consolidated Copper & Silver Mining Company. Judgment for defendant, and plaintiff appeals. Affirmed.

[5a] A decree in favor of the defendant was affirmed in Wailes v. Davies, 164 Fed. 397.

BRANTLY, C. J.[6]—The defendant, claiming to be the owner of certain mining ground in Jefferson county under quartz locations designated as the Mammoth, Rarus, Tucker, Anaconda, and Big Butt quartz mining claims, applied to the United States for patents therefor. The plaintiff, claiming a prior right to a portion of the ground under quartz locations designated as the Florence, Jack Taylor, Elaine, Tyrant, Sailor Boy, Stella, Forest, Black Horse, and Twin Boy, filed its adverse claims in the United States Land Office, and brought this action to determine the right to the possession of the portion in controversy in pursuance of the requirements of the federal statute. * * *

The claims of plaintiff here involved are situated on the side of Valparaiso Mountain toward the southtwest. On that side is a deep gulch, extending along the base of the mountain from the southeast toward the northwest. Beyond this, towards the southwest, is a low hill or spur, extending back into the mountains toward the west and northwest. Upon this is situated the M. L. claim, several hundred feet distant from the claims in controversy. Other claims of the plaintiff, intervening between this and the claims in controversy, lie in the gulch or extend into it from both sides in such a manner as to constitute them all a contiguous group. The defendant's claims also lie upon the side of Valparaiso Mountain, toward the southwest, and hence the conflict with plaintiff's claims. Prior to the year 1905 the annual representation work necessary to preserve title to plaintiff's claims had been done by sinking a shaft near the bottom of the gulch. So far as the evidence in the record shows, this shaft was so situated that it could have been used as a means of developing all the claims in a group and for the extraction of ores found in any of them. During that year the plaintiff, having concluded that the continuance of the work at this point would be attended with a greater outlay than the circumstances would justify, determined to transfer its operations to a tunnel which had been started by its predecessors on the M. L. claim on a level about 42 feet above the mouth of the shaft and the bottom of the gulch, and extending toward the southwest. For that and the following year the representation work was done by extending this tunnel; and so it was continued thereafter, the purpose being, as stated by an officer of the company, to intercept a vein appearing in a shaft which had theretofore been sunk on the M. L. claim from the top of the hill. During the year 1906 the tunnel was extended 146 feet in the same general direction. Up to this depth it is parallel with the apparent strike of the vein exposed in the shaft on the M. L. claim. Continued in this direction it would miss the vein entirely and pass through the hill. Subsequent to the bringing of this action its direction was changed, first to the south and then to the east,

[6] Part of the opinion is omitted.

with the result that the vein in the M. L. was finally intercepted at a distance of more than 500 feet from its mouth. If driven in its final direction, it would reach the surface of the hill to the east or northeast on a level 42 feet or more above the bottom of the gulch. This was the situation of affairs at the time of the trial.

Defendant's evidence, besides showing that the work of development, and incidentally that of representation for the year 1906, had all been done in the tunnel as heretofore stated, and that this was the only work that had been done upon any of the group of claims, tended strongly to show that the tunnel could not, within the range of reasonable possibility, be availed of to develop any of the claims on Valparaiso Mountain. The contention of the plaintiff was, and it undertook to show by its witnesses, that by sinking upon the vein at the point of its interception by the tunnel it could drive a cross-cut or drift under the gulch and thus develop and mine the claims beyond, and that the tunnel had been driven with this end in view There is no controversy but that the expenditure made in the tunnel in 1906 was sufficient in amount to represent all the claims in the group. The evidence is silent as to whether the vein intercepted in the tunnel is the discovery vein of the M. L.; and, while there is some evidence tending to show that its strike is in the general direction of some of plaintiff's claims across the gulch, there is none furnishing a substantial basis for the inference that it crosses the gulch in their direction or that tends to identify it with any vein found in any of them. Many witnesses, practical miners and mining engineers, were examined, who expressed opinions in support of the claims of the respective parties, giving their reasons therefor. The statements of these witnesses cannot be reconciled.

It is now well settled that the annual expenditure required by the federal statute to preserve the title to mining claims may be made in work or improvements within the boundaries of the claims themselves, or upon one of a group of contiguous claims,[7] or upon adja-

[7] It is frequently stated that the claims must be contiguous, but in Altoona Quicksilver M. Co. v. Integral Quicksilver M. Co., 114 Cal. 100, 45 Pac. 1047, 1049, Temple, J., for the court, said:

"The fact, however, if so it was, that the claims did not actually touch each other, and there was a narrow strip of land between the locations, would not determine the question. Mines may be conceived of as so situated that the same work may be, and appear to be, expended in opening or developing both mines, although they are not actually contiguous."

If the claims have to be contiguous, that means that they must touch at more than one point. "Where several claims are held in common, the annual assessment work for all may be done upon one of the claims or upon adjacent patented land or even upon public land provided that the claims are contiguous, and that the work is for the benefit of all of them, and tends to develop them all and to facilitate the extraction of ore therefrom. * * * Two tracts of land which touch only at a common corner are not contiguous."—Gilbert, Circuit Judge, in Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205, 105 C. C. A. 45.

cent patented land, or even upon adjacent public land, provided only it is made for the purpose of developing the claims and to facilitate the extraction of ore therefrom. Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740; Power v. Sla, 24 Mont. 243, 61 Pac. 468; Hall v. Kearny, 18 Colo. 505, 33 Pac. 373; Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990;[8] 2 Lindley on Mines, 629, 631. In Smelting Co. v. Kemp, supra, it is said: "Labor and improvements within the meaning of the statute are deemed to have been had upon a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development—that is, to facilitate the extraction of the metals it may contain—though, in fact, such labor and improvements may be on ground which originally constituted only one of the locations as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the débris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim when one shaft would suffice for all the locations." The language used by the court evidently means that, if the work done on one of the claims has no reference to the other claims in a group or does not tend to develop all of them in conformity with a general plan adopted with that purpose in view, it cannot be considered as work done upon them as a group or consolidated claim. This view is borne out by the decision in Jackson v. Robey, supra, where the above passage is quoted in support of a statement made in defining the meaning of the statute: "In such case the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim, which has no reference to the development of the others, will answer." If the work is not a part of a general plan having in view the development of the group or consolidated claim, so that the ore may be more readily extracted, and the work has no reasonable adaptation to that end, then no matter what the amount of it is, it cannot be said to have been done in the development of the

[8] "It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of different locations to combine, and to work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of one of them, without reference to the development of the others. In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made or the labor be performed upon any one of them." Field, J., in Jackson v. Roby, 109 U. S. 440, 27 L. ed. 990, 3 Sup. Ct. 301, 303-304.

group. In such cases it is usually a question of fact for the court or jury, as the case may be, to say upon the evidence whether the requirements of the law have been met.

The courts are reluctant to enforce forfeitures. He who claims such a penalty to defeat the title of his adversary must plead it specially, and, besides, must establish it by clear and convincing proof. Strasburger v. Beecher, supra. Nevertheless, when it appears, as in this case, that the representation work done was not done upon all the claims, but upon one only of the group for the alleged benefit of all, then the burden shifts, and the requirement that the work must be adapted to the development of all the claims and was intended for that purpose must be met. This rule is recognized by all the authorities, so far as they have been called to our attention. Hall v. Kearny, supra; Copper Glance Lode, 29 Land Dec. Dep. Int. 542; Lindley on Mines, § 631. It is primarily a question within the province of the trial court to determine whether the proof is sufficiently clear and convincing to satisfy the requirement; and in equity cases, such as this, though this court may examine the evidence and determine the question of fact for itself (Rev. Codes, § 6253), yet it may not overturn the findings of the trial court unless there is a decided preponderance of the evidence against them. Bordeaux v. Bordeaux, 32 Mont. 159, 80 Pac. 6; Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918; Watkins v. Watkins, 39 Mont. 367, 102 Pac. 860.

Taking into consideration the position of the M. L. claim, with reference to the others in the group; the fact that the tunnel is across the gulch from the others; that it is on a level above the bottom of the gulch; that it extends away from all of the claims in controversy; that it was intended primarily to intercept the vein in the M. L. claim; that it does not appear that this vein traverses any of the other claims or even crosses the gulch in their direction; that in order to render the tunnel available to develop any of them, it will be necessary to sink a shaft or winze to a depth below the level of the gulch and drift to the eastward many hundreds of feet; that to carry out this plan it will be necessary to install heavy and expensive machinery at the collar of the proposed shaft or winze, to raise the ores, and waste and water encountered, to the level of the tunnel in order to convey them to the surface, whereas this could all have been accomplished with less expense and much more convenience by the use of the shaft in the gulch—taking into consideration the whole of the environment, we think the trial court was justified in its conclusion that the forfeiture alleged by the defendant was clearly and satisfactorily established. The conclusion seems unavoidable that the purpose in extending the tunnel was primarily to encounter pay ore in the M. L. claim, and that it could not reasonably have been in-

tended as a part of any general plan to develop the claims across the gulch or any of them[8a]

Counsel for plaintiff contends that it appears that the work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that the court should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed by the owner in adopting the plan pursued. As an abstract proposition we think counsel states the correct rule. Mann v. Budlong, 129 Cal. 577, 62 Pac. 120; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600. Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which it bears to the claim itself. If the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded.

The judgment and order are affirmed.

HALL v. KEARNY ET AL.

1893. SUPREME COURT OF COLORADO. 18 Colo. 505, 33 Pac. 373.

ACTION by Stephen W. Kearny and James H. Nolan, against George W. Hall for possession of a certain mining claim. From a

[8a] "To make work done on a tunnel an improvement upon another mining claim under the law requiring annual labor, the work must have been done for the express purpose of benefiting such claim, and for its development. Bryan v. McCaig, 10 Colo. 309, 15 Pac. 413. If plaintiff did an insufficient amount of work to hold its entire group, yet posted notices that the work on each claim was being done through specific tunnels, it could not thereafter, when certain of such territory became valuable, through discovery and development by others, apply the work to such particular territory only in order to hold it. * * * Where several contiguous mining claims constitute a group, and expenditures are made upon an improvement which is intended to aid in the development of all so held, the improvement constitutes a distinct entity, not subject to physical subdivision, or apportionment, in its application to the claims intended to be benefited by it. The work performed attaches to the claims collectively, and not severally. This is the rule clearly and forcibly announced by the Secretary of the Interior in Re James Carretto and Other Lode Claims, 35 Land Dec. Dep. Int. 361, 364. It is there said: 'To undertake to set apart or apportion a physical segment or section or an arbitrary fractional part of a common improvement, and to credit the value thereof to a particular claim, is in violation of the theory of a common benefit accruing from a common improvement. The scheme here invoked for adjusting the monetary worth of the benefit derived from a common improvement is on its face unreasonable and leads to a result but little short of absurd. The department is of opinion that it is unwarranted and unauthorized by, and contrary to, the law. * * * In this or in any similar patent proceeding, where a part of the group is applied for and reliance is had upon a common improvement, the Land Department should be fully advised as to the total number of claims embraced in the group as to their

judgment entered on the verdict of a jury in favor of plaintiffs, defendant appeals. Reversed.

Kearny and Nolan, claiming to be the owners of the John Randolph and Roscoe lode mining claims, both conflicting with the Monitor Extension location, instituted this suit in support of two adverse claims filed by them against Hall's application for a patent. The answer alleges failure by plaintiffs to do the necessary annual labor on the Roscoe and Randolph lodes for the years 1883, 1884, and 1885, and the subsequent location over them of the Monitor Extension lode.

HAYT, C. J.[9]—The location of the Monitor Extension lode is subsequent in point of time to both the Roscoe and Randolph locations, made by appellees, Kearny and Nolan. The judgment of the district court in favor of appellees must therefore be sustained, unless it appears that the location of either the Roscoe or Randolph lodes were not perfected as required by law, in the first instance, or that appellees failed to keep the locations good.

The principal point of contention in the court below grew out of the forfeiture claimed by Hall because of the alleged failure of appellees to do the annual labor upon their claims for the year 1884. Considerable testimony was introduced for the purpose of showing the nature and extent of the work claimed as the annual labor for the Roscoe and John Randolph lodes for that and other years. The uncontradicted evidence shows that in the year 1883 appellees commenced a tunnel near the west side line of the John Randolph location, and extended the same from time to time, until a distance of 127 feet westward was reached. The greater portion of this tunnel is upon a patented mining claim known as the "Nolan-Gilmer Lode," and at the time the property of appellees. In the year 1884 appellees sank an incline near the breast of this tunnel, and upon the patented territory. They claim that the work in this tunnel and upon the incline was done for the purpose of developing the Roscoe and John Randolph claims, and that it should be treated as a compliance with the law relating to annual assessment work. The appellant denies that the work was done for this purpose, or that, as a matter of fact, it in any way inured to the benefit of appellees' claims, or either of them. All, or nearly all, the work claimed as annual assessment work for the years 1884 and 1885 was done within the territory covered by the Nolan-Gilmer patent, in the prosecution of this tunnel and incline. Appellees being able to satisfy the jury as to the validity of their locations, Hall could acquire no adverse rights by reason of the Monitor Extension location, made in 1885, unless appellees

ownership and as to their relative situations properly delineated upon an authenticated plat or diagram.'"—White, J., in Duncan v. Eagle Rock Gold Mining and Reduction Co., 48 Colo. 569, 111 Pac. 588, 594, 139 Am. St. 288.

[9] The statement of facts is abbreviated and part of the opinion is omitted.

had forfeited their prior rights to the premises by a failure to do the necessary assessment work for the preceding year.

The foregoing statement will be sufficient to show the importance of having the jury correctly instructed upon the question of forfeiture thus raised. Instruction No. 5, given by the court below, reads as follows: "You are further instructed, if Hall claims the Randolph and Roscoe lodes because forfeited by reason of the failure by plaintiffs to do the annual labor thereon in 1884, the burden of proof is on him to show, by a fair preponderance of testimony, the work which plaintiffs did do was not of such character as to the place where done, that it would inure to the benefit of said Randolph and Roscoe lodes as annual labor." Under the circumstances of this case the instruction is erroneous. Although the burden of proving a forfeiture is always upon the party relying upon the same, in this case this burden was discharged, prima facie, by showing that no work during the year 1884 had been done upon either the Randolph or Roscoe lodes, or within the surface boundaries of either of these claims. If labor was in fact performed upon adjacent property that might properly be considered as development work for these claims, as contended, it devolved upon Kearny and Nolan, and not upon Hall, to show affirmatively such facts. Appellees attempted to meet this requirement by showing that they had started a tunnel near the west side line of their claims; the west side lines of both being practically the same at this point. This tunnel was extended out of and away from the claims in controversy into patented territory, in which they were also interested. Under these circumstances there is no presumption that this work was for the development of either the John Randolph or Roscoe claims. In fact, the presumption is against such contention, and, after proof that the annual assessment had not been done within the surface boundaries of these locations, it was incumbent upon appellees to show that such work as had been done elsewhere was in fact intended as the annual assessment upon these claims, and was of such a character as that it would inure to the benefit thereof. By the instruction given at the trial this burden was placed upon appellant. For this error the judgment of the district court must be set aside.

In view of a new trial, other assignments of error will be noticed. It is contended that under no circumstances can the work performed within the exterior lines embraced within the Nolan and Gilmer patent be taken into consideration in determining whether the required labor or improvements were put upon the claims in controversy. In our opinion this claim of counsel is unsound. If the work was in fact done for the development of the Randolph and Roscoe claims, it may properly be considered as annual assessment work for such claims, notwithstanding the fact that it was performed outside of the exterior lines of such property. In the case of Doherty v. Morris, 17 Colo. 105, 28 Pac. Rep. 85, an expenditure incurred in con-

structing a wagon road across adjacent territory to a mining claim, for the purpose of better developing and operating such claim, was treated as a compliance with the law relating to annual assessment work. In the case of Smelting Co. v. Kemp, 104 U. S. 636, it was held that labor and improvements might be considered within the meaning of the statute when the labor was performed or the improvements were made for this development, though in fact such labor and improvements were at a distance from the claim. The latter opinion had reference to placer claims, and it was said that where the labor was performed for the turning of a stream, or the introduction of water to the claim, or where the improvement consists in the construction of a flume to carry off the debris or waste material, it might properly be considered as assessment work. Nothing is said in either of the opinions in the cases cited with reference to whether the work was upon patented or unpatented property, but we think it would be unreasonable to hold that such labor and improvements would not avail even if upon patented property. Did the work, where done, tend to the development of the Randolph and Roscoe claims? and was it in fact performed for the benefit of these locations? are the controlling questions to be determined; and it is immaterial whether the improvement is upon patented or unpatented property, except as this may throw light upon the intention of the parties in doing the work. * * *

For the error pointed out in the instructions, the judgment must be reversed.[10]

FREDRICKS v. KLAUSER.

1908. Supreme Court of Oregon. 52 Ore. 110, 96 Pac. 679.

Suit by George W. Fredricks against Antone Klauser. From a decree for defendant, plaintiff appeals. Modified, and decree entered.

[10] In Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205, 105 C. C. A. 45, where plaintiffs relocated for failure of defendant to perform the annual labor, the defendant relied on the construction of a drain two miles away from the claim in controversy as meeting the annual labor requirement. The verdict of the jury and the judgment in ejectment were in favor of the plaintiffs and in affirming the judgment, Gilbert, Circuit Judge, said:

"It goes without saying that a drain two miles away from a placer claim, without an intention to extend it, does not tend in any way to enhance the money value of that claim, and is of no use whatever in prospecting, developing, or operating it. On the other hand, it is conceivable that such a drain thus begun under a definite plan for its extension through a series of claims might, when completed, be of great benefit and value to each. In such a case work done at a distance from any one of the claims might be reckoned as assessment work thereon, since it would tend to its benefit or improvement. The court in its instructions gave the plaintiff in error the benefit of all its evidence as to the extent of the work done on the drain, its intention to complete the same, and the resulting benefit to the claim in question.

MOORE, J.[11]—The plaintiff alleges that, for the time the Highland Chief and the Gold Dust claims were severally located, he and his predecessors in interest annually expended in labor and improvements upon each of such claims a sum in excess of $100. * * *

Arbuckle [plaintiff's agent] left the mines May 16, 1906, going to another district, and on August 25th of that year, the defendant claiming that the requisite amount of assessment work for the preceding year had not been done upon either of the claims, attempted to locate the Liberty quartz mining claim and included within its boundaries nearly one-half of the Highland Chief and of the Gold Dust, and also small parts of the Spanish Tom and of the Highland Queen mining claims. The plaintiff's counsel, insisting that no forfeiture of either claim had occurred, offered in evidence receipts for money disbursed by their client during the time specified, amounting to $957.71, and contend that the court erred in finding that the value of the labor performed and of the improvements made in the year 1905 was less than $100. The written acknowledgments of such payments, the receipts for which are grouped in some instances, are as follows, A. Klauser, $37; Charles Wise, $23.95; Joseph Silvers, $1; J. E. Pugh, $142.80; M. Silvers, $139.05; Basche-Sage Hardware Co., $44.52; S. Bond, $22.40; Durkee Mercantile Co., $38.30; and S. C. Arbuckle, $508.69.

To determine what sums of money so paid should be credited on account of development work, the items thus set forth will be considered in the order stated. The money received by Klauser, $37 was for 14 days' work at the Highland Chief claim, most of which time was employed in extending the tunnel, and the sum so paid should be accounted for as labor performed. Wise earned $23.95 for 8 days' similar work. Of this sum $3.95 was paid, evidently at his request, to the Durkee Mercantile Company; and the entire amount is a proper credit.

Joseph Silvers received $1 for moving dirt at the Nineteen Hundred and One mining claim. The defendant's relocation is based upon an alleged forfeiture of the preceding right to the possession of the premises by reason of neglect to make the required improvement, which averment imposed upon him the burden of establishing the fact of such loss. A prima facie case in his favor was made when it appeared that the labor was not performed within the limits of the claim during the year relied upon, whereupon the burden shifted to the plaintiff, making it incumbent upon him to prove that, though the annual assessment or any part thereof was done outside the claim described, the work was performed for and inured to the benefit of such mine. 20 Am. & Eng. Ency. Law (2d Ed.) 737; 27 Cyc. 593. As the plaintiff failed to show that the labor performed by J. Silvers

[11] The statement of facts and a part of the opinion are omitted.

was of any benefit to the Bartholf Group, or to any claim thereof, the disbursement of $1 must be rejected.

Pugh received $142.80 for about 3,200 linear feet of timber which, at Arbuckle's request, he secured and hauled to the mining claims in November and December, 1905, a part of which material was used in the tunnel, forming three sets of stulls of five feet each. It is impossible from the transcript before us accurately to determine the value of the timber so used, but the worth thereof will be hereinafter estimated. Some of the timbers were taken from the mining claims pursuant to an agreement to return them when so requested.

Excepting the year when a location is made (chapter 9, 21 U. S. Stat. 61), there must annually be expended not less than $100 in labor or improvement upon each unpatented mining claim located after May 10, 1872. Where, however, two or more contiguous claims are held in common, such expenditure may be made upon any one claim. Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426); Gird v. California Oil Co. (C. C.) 60 Fed. 531; Royston v. Miller (C. C.) 76 Fed. 50. The word "improvement," as thus used, evidently means such an artificial change of the physical conditions of the earth in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral therein or to facilitate its extraction, and in all cases the alteration must reasonably be permanent in character. Thus in Honaker v. Martin, 11 Mont. 91, 27 Pac. 397, the owner of a mining claim, not having performed in a certain year the required amount of assessment work, sought to prevent a forfeiture of his right to the possession of the premises by resuming the development early in the succeeding year, paying for that purpose $63 for logs, slabs, and lumber which were taken to the claim, but not used, and it was held that the work had not been resumed in good faith. In the development of a mining claim, the maxim that equity regards as done what was intended has no application, and hence the timbers which Pugh took to the premises, but were not there used, never became a part of the claims and the value of such material should not be reckoned as an improvement.

M. Silvers received $65 for a pair of horses and $74.05 for hauling goods and material to the mines. It is difficult to understand how money disbursed in purchasing horses can be regarded as of any benefit to a mining claim. If the animals had been used in the tunnel to draw cars, or employed at a shaft to raise ore, etc., the reasonable compensation for their daily service might be treated as labor performed (Wright v. Killian, 132 Cal. 56, 64 Pac. 98), but the sum of money paid for their purchase cannot be viewed as an expenditure incurred in the development of a mining claim. Some of the material which Silvers took to the mines consisted of about 150 feet of iron rails, a part of which was used in laying a track in the tunnel, and the remaining rails, about 137 feet, were taken to another mine, under an agreement to return them when so requested. The cost of

hauling the rails that were used in, and thus became a part of, the mining claim is a valid expenditure, but, as it is impossible to segregate the sum of money thus applicable from the payment that was made, the value of the rails that were used will be estimated in determining the worth of the tunnel that was extended in 1905. Silvers also took to the mines some powder, fuse, candles, etc., which were used in driving the tunnel, and the cost of transporting such goods will be valued in the manner indicated. The remaining part of the payment made to him was for hauling to the mines supplies, etc., which were there used in furnishing food to the men who were employed in doing development work and who received board in addition to their wages. The reasonable value of the meals provided should augment the earnings of the men so employed, and will be so treated; but the money expended in transporting the supplies is not a proper charge for development work, and the entire claim must be disallowed.

The money paid to Basche-Sage Hardware Company, $44.52, was principally for iron rails, some of which were laid on ties placed in the tunnel. The worth of the rails so used will be estimated in determining the value of the extension made to the tunnel, but the payment so made will be disregarded.

Bond received $22.40 for tools, etc., which were taken to the mines where they were used. These implements did not become a part of the mining claims, and, though a reasonable compensation for their use might be considered as development work, the purchase price cannot be so treated; and the payment will be rejected.

The Durkee Mercantile Company received $38.30 for cutlery, dishes, tinware, groceries, provisions, tobacco, bed clothing, etc. Included in the receipted bill with the items noted appear charges for a box of candles sold, $2.85, which, if used at the tunnel, might be credited as an expenditure, and will be so considered in making the estimate adverted to. The other items, however, do not constitute an improvement; and the claim will be disallowed.

The disbursement to Arbuckle was for groceries which he bought, $11.55, for money expended in paying for a table cloth, towels, livery hire, feed for horses, and horse shoeing, $11.80, and the remainder, $485.34, was given for the labor and services which he rendered as manager from October 2, 1905, to May 16, 1906. The only item for which he received payment that should be credited on account of development is the actual work he performed at the mines. He testifies that, though he remained at the claims most of the time during the period stated, the labor he performed required from 18 to 25 days' time. There was no machinery or other fixtures of importance at the mines, the preservation of which necessitated a watchman, when the development work had ceased, and, this being so, the worth of the actual labor performed by Arbuckle in endeavoring to increase the world's wealth by making an honest effort to discover valuable

minerals is the only credit to which he is entitled. Altoona Mining Co. v. Integral Mining Co., 114 Cal. 100, 45 Pac. 1047; Hough v. Hunt, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17. The entire payment thus made to him will be rejected, but in estimating the value of the development work done in the year 1905 credit will be allowed for the actual labor which he performed.

Giving to the testimony that degree of weight to which we think it is entitled, it unmistakably appears that Klauser and Wise worked at the mines 14 and 8 days, respectively, and that Arbuckle did some work that tended to advance the development. Their combined effort extended the tunnel 27 feet and 6 inches, and cut a drift therefrom 5 feet and 6 inches in length, making a total of 33 feet. The testimony of plaintiff's witnesses is to the effect that the value of such work is $8 a foot, while defendant's witnesses assert that one-half that sum is ample compensation for the labor performed and for all other expenses incurred in connection therewith. Considering the payments made to Klauser and Wise, and the extent of the work done by each in extending the tunnel, we think the testimony of defendant's witnesses preponderates as to the reasonable value of the improvements made to the Highland Chief mining claim in the year 1905 and $132 will be allowed as the entire sum legitimately expended on account of the assessment work, including the labor performed by Arbuckle, and the cost of the timbers, iron rails, powder, fuse, candles, board, and all other material necessary to complete the work in the condition in which it now exists. This conclusion is based upon Arbuckle's testimony, which is to the effect that the defendant in 14 days drove the tunnel 24 feet and 7 inches; and that Wise in 8 days, assisted to some extent by the witness, further extended the subterranean passageways 8 feet and 5 inches. For the performance of such labor Klauser and Wise respectively received $37 and $23.95 and their board, which appears to have reasonably been worth 85 cents a day, thereby augmenting the cost of such labor for 22 days $18.70, and making the sum which should have been credited to them $79.65, and leaving $52.35 as the value of Arbuckle's labor and the cost at the mines of the rails and timbers that were incorporated in the premises, which credit is, in our opinion, sufficient to cover all the expense incurred. Permitting the utmost credit possible for Arbuckle's work of 18 to 25 days, and considering all other items of expense incurred in extending the tunnel, the outlay for such labor, including the work performed by Klauser and Wise, and of the improvement made, cannot, under any method of computation, equal $400, the sum necessary to have been disbursed in the year 1905 in order to maintain a right to the possession of the Bartholf Group; and hence any theory that may have been adopted at the trial must be unavailing when the four mining claims are considered as a group. The sum of $132 so allowed for the improvement made is sufficient, however, to prevent a forfeiture of the High-

land Chief mining claim upon which the expenditure was employed, treating that claim and the Gold Dust as separate and distinct entities as set forth in the complaint, the averment in respect to which must be controlling.

The decree will, therefore, be modified and one entered here enjoining the defendant from interfering in any manner with the possession of the Highland Chief quartz mining claim, and from asserting any right, title, claim, interest, or estate therein by reason of the attempted location of the Liberty quartz mining claim, which is hereby set aside so far only as its boundaries conflict with the Highland Chief quartz mining claim.[12]

HAWGOOD v. EMERY.

1909. Supreme Court of South Dakota.
22 S. Dak. 573, 119 N. W. 177.

Injunction by John N. Hawgood against Moses S. Emery. From a judgment for defendant, plaintiff appeals. Affirmed.

Whiting, J.—This cause comes before the court upon an appeal from the judgment of the circuit court of Lawrence county; the errors complained of being in the rejection of certain testimony offered by the appellant on the trial in said circuit court.

It appears that the plaintiff and defendant were the owners in

[12] "It is further urged that the court erred in refusing defendant's requested instruction 13 in the form requested. The instruction as requested was as follows: 'The jury is also instructed that, in estimating the amount and value of labor performed and improvements made on the Pinder claim, they should take into consideration any road, building, and also blacksmith shop or blacksmith implements built, made, or placed upon the claim, if any, provided they further find from the evidence that such road, building, blacksmith shop, or blacksmith implements were placed upon the claim for the purposes of aiding in the work on and development of the claim, and did tend to aid in the working and development of the claim.' The court gave this instruction, but added the following: 'But if you find from the evidence that any blacksmith shop and blacksmith implements were so placed on said claim for the use of men doing assessment work on other claims owned by defendant, as well as on the Pinder claim, then you will not be at liberty to estimate same as part of the improvements on the Pinder for the year 1897.' We are of the opinion that the modification of the instruction was proper under the facts of this case. The instruction as given allowed the defendant the benefit of the improvements named, including the blacksmith shop, if done or made for the Pinder claim exclusively. The testimony, however, indicated that the blacksmith shop was for the joint benefit of a group of claims. There was no testimony to show how many claims it was to be used for, nor any other basis from which could be deduced the result as to what proportion of the improvement was attributable to the Pinder. There being no data given the jury from which this conclusion could be reached, the court was right in withdrawing

common of two certain adjacent mining claims involved in this action; that the defendant and respondent claiming that the plaintiff and appellant had not performed his share, or any part thereof, of the work required under section 2324 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1426), the said defendant had proceeded to give notice of forfeiture of the plaintiff's rights to said claims under the statutes of the United States relating to such forfeiture. The plaintiff brought this action to restrain the defendant from filing the necessary papers in the office of the register of deeds in Lawrence county, and to restrain him from asserting any right, title, or interest in and to the undivided interest in said claims claimed to be held by said plaintiff, and also asking for a decree of court quieting in said plaintiff title to the undivided interest in said claims. Plaintiff in his complaint set out that he had fully complied with the requirements of law as regards the representation and development of said claims. The defendant, answering, admits that he was in the act of taking steps to declare a forfeiture of plaintiff's title to said mining claims, and sets forth the fact that he, the said defendant, had performed the labor and made the improvements on said claims for the years in question that was necessary for their representation and development, and alleged that the plaintiff had wholly failed in performing assessment work upon the said mines or lodes for years in question, and had failed to pay to defendant for his (plaintiff's) proportionate part of the work done by defendant within 90 days after demand so to do.

Upon the trial plaintiff offered evidence to show that he performed work on certain adjacent claims, for which work he claimed he was entitled to receive credit on the claims in litigation for the reason that such work was beneficial to and naturally tended to the development of the claims in question. He offered to show that he posted notices in conspicuous places on the claims in litigation, notifying the world that development work for said claims was being done on the said adjacent claims, and also offered to prove that notices were posted conspicuously at the entrances of the workings on said adjacent claims notifying the world that said workings were being carried on in part for the benefit of the claims in litigation. It appears by the evidence that the parties to this action, while partners

the matter from the consideration of the jury. While it is undoubtedly the law that improvements put upon one of a group of contiguous claims, to which the particular claim belongs, and for the common development of all, are to be considered in determining whether improvements for a given year have been made, the utmost that can be credited to any one claim on this account is its fair proportion of the common benefit. There being nothing in the evidence from which the jury could deduce this proportion, the court was justified in debarring them from the field of speculation and confining them to the realm of fact." Pope, J., in Upton v. Santa Rita Min. Co., 14 N. Mex. 96, 89 Pac. 275, 284.

as regards the claims in question, had not been on speaking terms during the years when it is claimed by each that they did the work they base their rights on. It also appears that the defendant had no interest whatsoever in either of the claims upon which plaintiff claims to have done the work for which he should receive credit, and it does appear that, as regards two of these adjacent claims, the plaintiff was the sole owner thereof and the owner in common with other parties in the three other claims upon which said work had been done. There is no claim made that the defendant ever entered into any agreement for the doing of the development work on the claims held by the plaintiff and these third parties. It will be seen, therefore, that the ruling of the court in excluding the testimony sought to be introduced by the plaintiff was error, providing that, under the facts above set forth, the plaintiff would have any right to have his work credited on the claims in litigation.

I think it is well settled both by the decision of this court found in Godfrey v. Faust, 20 S. D. 203, 105 N. W. 460, and under the holdings in 2 Lindley on Mining, §§ 630–631, together with the long line of authorities cited by our court, and also by Lindley, as well as the authorities cited by both parties on this appeal, that, where a person or persons hold several claims that are adjacent, work can be done on one claim and be credited on the other claims; also, that work can be done outside of the limits of the claim, and have it credited on such claim where such work is beneficial to the claim, and that this is true even if there are several claims for which credit is asked for said outside work, provided said several claims are held in common; also, that, where there are several claims adjacent held by different persons and work beneficial to all of said claims can best be done on one of them, then, under a proper agreement between the owners of said claims, development work can all be done on one claim, and be credited to the several claims, such work being a part of the general plan or scheme for the development of the several claims.

As we understand the case at bar, it is under this last proposition that the appellant contends that he should be allowed to introduce the evidence rejected; his contention being that said evidence would have shown that the work done was beneficial to the claims in litigation. We think, however, that the rulings of the circuit court were correct for the following reasons: It does not appear that said work was any part of a general plan or scheme for the development of the mines in question in connection with the mines upon which the work was done. Furthermore, this was an attempt of one partner to enter into a scheme whereby, without any agreement therefor with his partner, he would perform work upon property of which he was the sole owner, and upon property of which he was part owner with third parties, and hold the defendant liable therefor. The

claim of plaintiff cannot be upheld, unless the court would be willing, in case this was an action of plaintiff against defendant for an accounting, to allow plaintiff a money judgment for said work. And upon what theory could that be done? It would certainly throw the doors open to fraud if one member of a partnership, regardless of the wishes of his copartner, could do work upon his individual property beneficial to the same, and afterwards recover from his partner therefor on the theory that his partner was benefited, especially where, as in this case, there was no agreement or understanding in existence under which the defendant or any purchaser of his right could have held or claimed an easement in the premises upon which this work was being done, such as would follow the claims upon which such work was being done, provided said claims were sold to parties strangers to this transaction.

One illustration, it would seem, would show the weakness of plaintiff's contention. Suppose plaintiff owned a string of six claims adjacent one to the other such that work on any one of them could be credited in his behalf on all of them. Then suppose that said plaintiff had a half interest in six other claims, all of which were adjacent to the first-mentioned claims, the other half interest in said claims being held separately by six individuals, and all the claims, both those owned in common with the other persons and those owned by plaintiff, should be so situated that the work done by plaintiff on one of his claims could be held to be beneficial to the six claims in which he held half interest. Would any one claim that, if these owners of the other half interest in these claims each of them did the full amount of work necessary to hold their claim, the plaintiff without their consent and without any arrangement or agreement whatever could put in a claim against these several persons for a share of the money he had expended on his sole property upon the contention upon his part that the work he had done was done as a general plan or scheme for the development of all these claims. Such a claim as that would seem to us out of reason. And let us suppose that each of the owners of a half interest in a claim had each a claim adjacent to their said partnership claim, and that work on each partnership claim would benefit the claim held by such partner in severalty, and also the claims held in partnership, then, under the contention of plaintiff herein, the plaintiff's interest in the partnership claims would be subject to all of the work done on the six claims held in severalty by his partners. To complete the illustration, let us suppose that all of the workings on plaintiff's own claim and upon each of his partners' claims were of the same nature and would benefit the partnership claims in exactly the same way, and all seven of said workings were, as far as the partnership claims were concerned, of no more benefit than any one of said workings would have been. Under these facts, could each of the partners

credit himself up as against the partnership property for a share of the work done on his individual property? We think not.

In the discussion of this case, we have considered it as if the parties hereto were copartners in said claims; it having been so alleged and admitted in the pleadings. We do not, however, want to be understood as holding that two persons who unite in establishing a mining claim are more than cotenants or co-owners without some special agreement making them partners.

We, therefore, think that, under the facts as they appeared at the time the rulings were made by the circuit court, the court was correct in its rulings excluding the evidence offered.

The judgment of the lower court is sustained.

MERCHANTS' NAT. BANK v. McKEOWN et al.

1911. Supreme Court of Oregon. 119 Pac. 334.

Action by the Merchants' National Bank against David A. McKeown and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Eakin, C. J.[13]—This is a suit instituted to establish an adverse right to a mining claim, for which defendants have applied to the United States' Land Department for a patent. The Golden Star claim is one of a group of mines originally owned by the Copperopolis Copper Company, in Grant county, Or., to whose title plaintiff has succeeded. On January 2, 1908, defendants relocated it as the Argonaut quartz mining claim.

It is conceded that the Copperopolis Copper Company did no annual labor, as required by section 2326, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1430), upon the Golden Star claim for the year 1907. But plaintiff asserts that until June, 1906, it was performing labor in excavating a tunnel, and was erecting machinery upon the Protection & Oregon Bell claims, being patented claims in a group with the Golden Star, known as the "Home Group," for its development, and had constructed more than 600 feet of tunnel and had several thousand dollars' worth of machinery and buildings thereon; that for lack of funds it had ceased work thereon in June, 1906, and its superintendent, W. W. Gibbs, his wife, and son, had remained upon the property as keepers of the property until June, 1907. Gibbs' salary as superintendent was $150 per month. The son's salary as chore boy and the wife's as cook was $40 each per month. Plaintiff relied on these expenditures to constitute the annual labor for the 10 unpatented claims in that group. * * *

The only other contention of plaintiff is that the evidence estab-

[13] Part of the opinion is omitted.

lished the fact that plaintiff's grantors performed the annual labor for the year 1907 as required by the United States statute. It is not contended by plaintiff that any labor was performed on the Golden Star claim during that year, but that, it being a part of the "Home Group," work done and improvements made on the Protection and Oregon Bell claims prior to 1907, which was for the development of all claims, inured to the benefit of the Golden Star, and that the work of the watchman above mentioned in 1907 should be taken as the annual labor for those claims.

[3] When defendants established that no work had been done upon the Golden Star claim for the year 1907, which was admitted by plaintiff, the burden shifted, and was upon plaintiff to establish the fact that work done outside of the claim was for its benefit. 2 Lindley, § 630; Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589; Hall v. Kearney, 18 Colo. 505, 33 Pac. 373; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934. It appears from the evidence that in June, 1906, the Copperopolis Copper Company ceased operation upon the group and the men were discharged except Gibbs, a stockholder and officer of the company and superintendent of the operation, who remained upon the properties in the employ of the company, until June, 1907, as watchman or keeper. The improvements upon the Protection and Oregon Bell claims consisted of two engines and boilers, concentrating tables, two gigs, a gasoline engine, a dynamo, an ore crusher, an air compressor which was used in operating a drill in the tunnel, a ventilating system, operated in the tunnel by the gasoline engine. A part of this plant was obtained only to experiment on the ore from the Oregon Bell claim, and was not used more than a month or two. The only work done at any time which tended to develop the Golden Star claim was the tunnel which had reached within a few hundred feet of the claim; and the only machinery or improvements that related to it was such as were used in extending the tunnel. When the mine was shut down in June, 1906, the company had evidently no immediate prospect of resuming work. It ceased work for the reason that it had no money and was making an effort to sell the mine. Thereafter, in June, 1907, the property was attached for debt and placed in the hands of a receiver, and through such proceeding the property was transferred to this plaintiff.

[4] It is not contended that there was any work done on any of the group that could constitute development work for the year 1907, other than the expense of the watchman from January 1 to June 1, 1907, and the sufficiency of that expense to constitute the annual work for the Golden Star claim depends upon the necessity for the watchman, and whether the expense was sufficient for that purpose.

[5] During that period Gibbs was upon the property as keeper, but the services of the son in cutting wood for the house and caring

for the team of horses and those of the wife as cook were not necessary; nor was the company justified in paying a superintendent's salary for a watchman. There is no evidence as to the value of the services of a watchman, but it does appear that McClernan during the same time was performing annual assessment work upon the Kimbell group, belonging to the same company, at $3 a day, and paid his own board, and the expense of the watchman should be no more. Therefore if the expense of the watchman from January 1 to June 1, 1907, was necessary and was for the advantage of the Golden Star claim equally with the others, it would be insufficient to equal the annual labor required upon the 10 claims, and but a small part of the property to be cared for related to the group other than the two patented claims. The expense of the keeper is only allowable as annual labor when the mine is temporarily idle and the work is to be resumed again, the watchman being necessary to preserve the property needed when the work is resumed, and cannot be so applied from year to year indefinitely as a substitute for the annual labor. This is the holding in Hough v. Hunt, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17, where it is said: "The cases must be rare in which it can justly be said that such money is expended in prospecting or working the mine. There may be cases where work has been temporarily suspended, and there are structures which are likely to be lost if not cared for, and it appears that the structures will be required when work is resumed, and that the parties do intend to resume work in which money expended to preserve the structures will be on the same basis as money expended to create them anew. But this could not go on indefinitely. As soon as it should appear that this was done merely to comply with the law and to hold the property without any intent to make use of such structures within a reasonable period, such expenditures could not be said to have been made in work upon the mine." This case is cited with approval in Gear v. Ford, 4 Cal. App. 562, 88 Pac. 600; 2 Lindley, § 629; Fredericks v. Klauser, 52 Or. 110, 96 Pac. 679. See, also, Kinsley v. New Vulture Min. Co., 11 Ariz. 66, 90 Pac. 438, 110 Pac. 1135; Morrison on Mining Rights (14th Ed.) 118. The application of the expense of the keeper to the annual work in the case before us is excluded by the terms of the language quoted. Evidently the company was insolvent and had no intention of immediately resuming work, and the keeper was there to preserve the property, to aid in its sale, and not in the development of the mine. Even if it is conceded that the whole of the expense of the keeper should be credited as annual labor upon the ten unpatented claims, it is insufficient in value for that purpose.

The decree of the lower court is affirmed .

(c) *Locations Held by Adverse Possession and the Annual Labor Requirement.*

UPTON v. SANTA RITA MINING CO.

SANTA RITA MINING CO v. UPTON.

1907. Supreme Court of New Mexico.
14 N. Mex. 96, 89 Pac. 275.

Action [in support of an adverse brought] by James N. Upton against the Santa Rita Mining Company. From a judgment in favor of plaintiff, defendant appeals and brings error. Affirmed.

Pope, J.[14]—* * *

It is further urged that the court erred in refusing to permit proof as to defendant's adverse possession of the premises in question. * * *

The contention seems to be that, if the defendant held and worked the Pinder claim for 10 years—the statutory period for adverse possession in New Mexico—his title became, by virtue of the statute above quoted, good as against the world except the government, and the claim was not subject to relocation in 1898, notwithstanding he may have failed to do his annual labor for 1897. We are unable to find any warrant in law for this assumption. * * *

We believe that the true rule on the subject is succinctly stated in Altoona Co. v. Integral Co., 114 Cal. 100, 45 Pac. 1047, where it is said that "working for the statutory period before the adverse right exists is equivalent to a location under the act of Congress," and in Belk v. Meager, 104 U. S. 279, 287, 26 L. Ed. 735, where it is declared to be the "equivalent of a valid location." In other words, a party who has done such work occupies the status and possesses the rights of a locator, no more and no less. As in the case of a holder of a valid location, he has good title as against all but the government, so long as he does the annual labor. As is said by Judge Hallett, in Harris v. Equator Company (C. C.) 8 Fed. 863: "A presumption is indulged that the location was regularly made in the first place, and the party is allowed to remain so long as he shall comply with the conditions on which he holds the estate." When such party comes to apply for patent, his occupancy must be proven under certain regulations of the Department (2 Lindley, 1714) and, when so proved, if there be no adverse claimant, they are sufficient, as the statute says, "to establish a right to a patent." But in this he stands on the same basis as the holder of a location whose application

[14] The statement of facts is omitted and part only of the opinion is given. For another part see ante, p. 172.

is uncontested. The holder of such a possession, no less than the holder of a location, must possess the necessary qualifications as to citizenship. Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419. He must prove, as well as the locator, the possession of $500 worth of labor or improvements before he can secure a patent. Capital No. 5 Placer Min. Claim, 34 Land Dec. Dep. Int. 462, supra. Pending his right to patent, he must likewise perform the annual assessment required of the locator, for Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring such work "until patent shall be issued," makes no exception in his favor, and, in default of this, his claim is subject to relocation.

Nor do we find anything to the contrary of these views in the cases cited by the defendant. In Risch v. Wiseman, 59 Pac. 1111, 36 Or. 484, 78 Am. St. Rep. 783, the record showed specifically that the party relying upon the adverse possession had done $100 worth of work each year, so that, having possession equal to a location, his title was necessarily impregnable to any attack, except the government's. So, in Glacier Mining Co., v. Willis, 127 U. S. 471, 8 Sup. Ct. 1214, 32 L. Ed. 172, there is no reference to nor any attempted discussion of section 2332, nor any determination of the question of whether assessment work must be kept up. The same observations apply to 420 Mining Co. v. Bullion Co., 9 Nev. 240. We are clear, therefore, that it was no defense against a forfeiture, for failure to do assessment work for 1897, that the holder of the claim had been in possession of it for 10 years prior to 1897, and that the court did not err in rejecting this testimony and in refusing to give instructions based on the theory that such was a defense. * * *

The judgment is accordingly affirmed.

(d) *Annual Labor Pending Patent Proceedings.*

MURRAY ET AL. v. POLGLASE ET AL.

(ADAMS ET AL, Interveners.)

1899. SUPREME COURT OF MONTANA. 23 Mont. 401, 59 Pac. 439.

ACTION by James A. Murray and others against Jane Polglase and others to establish an adverse claim to a mine location [known as the Maud S], in which W. W. Adams and others intervened. Judgment was rendered for interveners, from which defendants [who located the Ramsdell claim over the ground of the Maud S and applied for patent] appeal; and plaintiffs appeal from the judgment and an order denying a new trial. Reversed.

BRANTLY, C. J.[15]—The records of the United States land department, introduced by defendants, show that the entry of the ground in controversy by the plaintiffs on December 29, 1887, was canceled for fraud, upon the protest of some of the defendants and the predecessors of the others. The fraud alleged and established was that plaintiffs had represented to the register and receiver that they had done sufficient work upon the claim to entitle them to a patent, whereas they had not done more than one-half that amount. From these facts and the foregoing statement it will be seen that the parties, respectively, occupy these positions: The plaintiffs contend that, by their entry and the receipt issued to them, the land was withdrawn from the public domain, so that the defendants could acquire no rights by their location on January 1, 1888, notwithstanding no work was done by plaintiffs for the previous year, and the entry was subsequently canceled for fraud. This withdrawal, they say, was effective to protect them against a location by any one else until the receipt was finally canceled on June 1, 1892, and that when this occurred they could resume work, and thus retain their original right. The defendants insist that, as the entry was void, because fraudulently made, the plaintiffs were not, even during the existence of the receipt, excused from doing the necessary work to prevent a forfeiture, and that a cancellation of the entry inured to their benefit, so as to give them a valid claim to the ground under their location. The interveners support the contention of the plaintiffs against the claim of the defendants, but maintain that their claim is good as against plaintiffs, because of a forfeiture incurred by plaintiffs in 1893. The trial court sustained the contention of the plaintiffs as against defendants, thus excluding defendants from the case, leaving only the question of the forfeiture of 1893 to be tried between the plaintiffs and the interveners. Both plaintiffs and defendants contend that the interveners have no rights in this case. These contentions require the solution of two questions: (1) Did the court err in permitting the intervention? (2) Assuming the defendants' location to be otherwise valid, did they acquire any right thereunder by virtue of the cancellation of plaintiffs' entry?

1. We are of the opinion that the trial court erred in permitting the intervention, [since interveners failed to file an adverse claim under the statute.] * * *

2. The answer to the second question will be reached when we have determined what obligation, if any, rested upon plaintiffs to do the representation work during the year 1887. Were they relieved from the necessity of doing it by the receipt obtained by fraudulent representations to the authorities of the land office? The contention of the plaintiffs is that they were. They proceed upon the assumption that after the officers of the land department have examined into the application for a patent, have determined that the applicant

[15] The statement of facts and parts of the opinion are omitted.

is entitled to purchase, have accepted his money in payment for the land and issued to him a certificate of purchase, he is vested with the full equitable title thereto. The land is then withdrawn from the mass of the public lands, and, no matter what infirmity may inhere in the proceedings by which he obtained his certificate, no one else can acquire any right to the land, as against him, so long as he holds the certificate. A fraudulent certificate, they say, is just as effective to preserve their rights as an honest one. There is no doubt that when the entryman has complied with the law in good faith, and has been recognized by the government as a purchaser, he is regarded, as to third persons and the government, the equitable owner of the land. As such, he is liable to pay taxes on it, the same as upon his other property. Carroll v. Safford, 3 How. 441, 11 L. Ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 839. He is to be treated as the owner. In Witherspoon v. Duncan, after asserting the power of congress to dispose of the public land either by sale or donation, the court proceeds: "In either case, when the entry is made and the certificate given, the particular land is segregated from the mass of the public lands, and becomes private property. In the one case the entry is complete when the money is paid; in the other, when the required proofs are furnished. In neither can the patent be withheld, if the original entry was lawful." * * * The cases of Carroll v. Safford and Witherspoon v. Duncan proceed upon the obvious principle that one who has purchased lands in good faith from the government, and holds the evidence of his purchase, is, as to the government and third persons, the equitable owner of them, and that he cannot avoid his duty to the state simply because he has not been vested with the legal title. The rule would be the same, however, if his title were fraudulent. So long as he stands as the apparent owner claiming the land, the obligation is the same. But his duty to the state, under such circumstances, would not prevent the government, or perhaps a person standing in its place, from avoiding his claim by showing it to be fraudulent and unfounded. * * * On the other hand, the parties plaintiff and defendant in this case stand as two rival purchasers, each claiming to be entitled to the land in question. The latter have confessedly acted in good faith in the performance of the required conditions, while the former, though admitting their fraud, nevertheless insist that, because they thereby induced the government to make them the apparent purchasers, they are excused from the performance of these conditions. Though they were detected in their fraud, and the government declared them without title, this fact, they say, did not affect their right to claim the land under the receipt while they held it, and thus to exclude others from acquiring any right thereto.

It is conceded on both sides that when a locator, having complied with the law, in good faith completes his proof and pays the purchase money, his equitable title is complete. The conditions are then all

performed, and no further obligation rests upon the applicant to expend money in doing the annual representation work. Even if the patent is delayed for any reason, still when it is finally issued it is evidence of the regularity of all previous acts, and relates back to the date of the original entry, so as to cut off any intervening rights. Indeed, the decisions are uniform on this question wherever it has been considered. Deno v. Griffin, 20 Nev. 249, 20 Pac. 308; Aurora Hill Consol. Min. Co. v. 85 Min. Co. (C. C.) 34 Fed. 515; Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 428, 12 Sup. Ct. 877, 37 L. Ed. 762; Barringer & A. Mines & Min. 265; In re Harrison, 2 Land Dec. Dep. Int. 767. But we have not been able to find any adjudicated case upon the exact question presented here. Counsel have cited none, and we therefore conclude that there is none. This fact, however, is to be noted: That in all the cases cited, except those arising out of railroad grants, the presumption has obtained that the entry in question was made in good faith, and in each one of them the entry was a subsisting one at the time the controversy arose. * * * The cancellation of plaintiffs' receipt adjudicated the fact that they obtained no title at all by their entry. By this judgment of the authorities of the land office they were deprived of the ability to claim any rights under it. They were left with just such rights as they had at the time they obtained it. If they chose to rely upon it as evidence of their title, and then forebore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost nothing. They stand in the same position as they would have stood on January 1, 1888, if they had not obtained the receipt at all. They cannot be heard to say that during the time the receipt was outstanding the land was withdrawn from the mass of public lands, and that defendants acquired no rights under their location. Plaintiffs' rights were forfeited, and the Maud S. claim was subject to relocation, at the time the Ramsdell claim was located. To hold otherwise would be to lend assistance to the fraud attempted by plaintiffs, and which would have been successful but for its exposure made by defendants and their predecessors. It would permit them to profit by their own misconduct, in violation of the principle expressed in the wholesome maxim, "Nemo allegans suam turpitudinem est audiendus." We are not to be understood as holding that the plaintiffs have no rights in any event. We speak upon the facts in the record before us. The trial court refused to permit the defendants to introduce the notice of location, and the facts upon which it was based, on the ground that there had been no forfeiture of the Maud S. claim. This was error. If upon another trial, however, it should appear that the acts done by the defendants on January 1, 1888, did not amount to a valid location, they would be in no position to take advantage of plaintiffs' forfeiture, and plaintiffs would be entitled to a judgment against them. Nor are we to be understood as dissent-

ing from the rule of the cases cited in the former part of this opinion, touching the force and effect of a certificate of purchase from the United States. The language used in those cases is very broad and sweeping, but is applicable only to the facts of those particular cases. Such a receipt is not open to collateral attack in the courts in controversies arising between rival claimants to lands covered by them. This case is an exceptional one, and is decided upon its own peculiar facts, under the principles applicable to them. * * *

The judgment herein in favor of the interveners against the plaintiffs and defendants; and the order denying plaintiffs' motion for a new trial, are reversed, and the cause is remanded, with directions to the district court to grant a new trial. It is further ordered that the defendants recover of the plaintiffs and interveners all costs incident to defendants' appeal herein, each being liable as against the other for one-half thereof, and that the plaintiffs recover of the interveners all costs incurred, both upon their motion for a new trial and upon their appeal. Reversed and remanded.

BATTERTON v. DOUGLAS MINING CO., LIMITED.

1911. SUPREME COURT OF IDAHO. 120 Pac. 829.

ACTION by James L. Batterton against the Douglas Mining Company, Limited. From a judgment for defendant, plaintiff appeals. Affirmed.

AILSHIE, J.[16] * * *

[3] After the entry by respondent had been allowed and proofs accepted, and this particular tract of mineral land became thereby segregated from the public domain, no one had any license or right to enter upon the land except the entryman and the owner of the legal title, the United States. No third person had any right to enter upon this particular body of land, and without the right of entry no legal discovery or location could be made. Aurora Hill Con. Min. Co. v. 85 Mining Co. (C. C.) 34 Fed. 515; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Swanson v. Kettler, 17 Idaho, 321, 105 Pac. 1059; Christy v. Scott, 14 How. 292, 14 L. Ed. 422. Appellant relies chiefly upon Murray v. Polglase, 23 Mont. 401, 59 Pac. 439, and United States v. Steenerson, 50 Fed. 504, 1 C. C. A. 552. Murray v. Polglase is almost identical in facts with the case at bar; the only material difference between the two cases being in the following particular: In the present case, it appears and has been specifically found by the trial court as well as by the General Land

[16] Parts of the opinion are omitted.

Office that the proceedings on the part of respondent in attempting to procure a patent were had in good faith, and the law was complied with in every respect, except that in some manner the notice and plat required by law to be posted were torn down or removed some 27 days before the expiration of the period of time for posting and publication. This appears to have been done without any fault of the applicant for patent and without the knowledge of the applicant. The notice had been posted in good faith, and the respondent and its agents had reason to believe that it had remained posted during the full period of time. In the Murray-Polyglase Case, the applicant sought to fraudulently acquire title to the mining claim by making false affidavits. The applicant for patent had represented that sufficient work had been done on the claim to satisfy the requirements of the statute and rules of the land office, whereas it was shown that, as a matter of fact, not more than half enough work had been done. In that case the Supreme Court of Montana considered the question of fraud practiced by the applicant for patent, and held that the case was an exceptional one, and that it should be "decided upon its own peculiar facts," and held that "where a receiver's receipt, showing that the entryman of a mining claim is entitled to the patent, is subsequently annulled for fraud practiced in obtaining it, and the entryman has failed to do the annual representation work, the claim is subject to relocation." It was finally held by the court that, the applicants for patent having failed to do the assessment work regularly up to the time of the cancellation of the entry, forfeited their rights, and that the claims were open to relocation, and that the location made by the defendants in that case prior to the cancellation of the entry was valid and superior to the claim of the applicants for patent.

In the Steenerson Case the Circuit Court of the United States for the District of Minnesota found that a pre-emption entry made under the land laws was fraudulent, and had been made for the purpose of enabling the entryman to strip the land of the timber growing thereon. Between the time of receiving the final receipt from the local land office and the cancellation thereof by order of the commissioner of the General Land Office the entryman cut and removed a large amount of timber from the land. The United States thereafter instituted replevin action against the entryman for the recovery of the timber. The court held that the receiver's receipt did not vest such a title as would afford the pre-emptor a defense to the action in replevin where the entry had subsequently been canceled on the ground of fraud. This latter case is a very different case from the one at bar. While the Murray-Polglase Case is readily distinguishable from the case at bar on the ground of the fraud which entered into that case, still the principle of law upon which the case was determined appears to be in conflict with the prevailing rule as the same has been announced by the federal courts. We shall not at-

tempt to reconcile that case with the cases hereinbefore cited, but we are inclined to the opinion that it is distinguishable from the other cases cited and the one at bar, in that the equities of that case were clearly against the patent applicant and with the defendant, the subsequent locator. * * *

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.[17]

(e) *Record Evidence of Performance of Annual Labor.*

COLEMAN ET AL. v. CURTIS ET AL.

1892. SUPREME COURT OF MONTANA. 12 Mont. 301, 30 Pac. 266.

ACTION by Lew Coleman and others against John H. Curtis and others, under Rev. St. U. S. § 2326, to determine adverse claims to certain land located as quartz lode claims. Judgment for plaintiffs. Defendants appeal. Affirmed.

HARWOOD, J.[18]—* * *

The instruction given by the court to the jury, objected to by appellants as erroneous, reads as follows: "It is not necessary that the labor done upon a claim to represent it be actually paid for. If labor of sufficient value be done on a claim within a given year, that is sufficient, even if it be not paid for; the payment being a matter between the laborer and the owners." Appellants contend that the labor performed, as annual representation of a mining location, is not effectual for that purpose, unless actually paid for; that, although such labor was performed on the claim as required by law, the same does not avail, unless the claimant has actually paid for such labor, if the work was performed by another. On this theory is predicated the objection to the instruction recited above, and to support their position appellants' counsel cite the statute of this state, which provides as follows:

"The owner or owners of any quartz lode claim, who shall perform, or cause to be performed, the annual labor or make the improvements required by the laws of the United States, in order to prevent a forfeiture of the claim, may at any time during the year, or within 60 days after the termination of said year in which said work was done or improvements made, file in the office of the county clerk and recorder of the county in which said claim is

[17] But see *contra* where the defect for which the receipt is cancelled is jurisdictional. McKnight v. El Paso Brick Co., — N. Mex. —, 120 Pac. 694.

[18] Parts of the opinion are omitted.

situated an affidavit or affidavits of the person or persons who performed such labor or made such improvement, showing—*First,* the name of the lode, and where situated; *second,* the number of days' work done, and the character and value of the improvements placed thereon; *third,* the date or dates of performing said labor and making said improvements; *fourth,* at whose instance or request said work was done or improvements made; *fifth,* the actual amount paid for said labor and improvements, and by whom paid, when the same was not done by the owner or owners of said quartz claim." Comp. St. div. 5, § 1483.

In relation to said affidavit, the statute further provides that "the affidavit or affidavits named in the preceding sections, or copies thereof, duly certified by the recorder of the county, shall be received or admitted in evidence in any court of justice in this state, and be *prima facie* proof of the facts recited therein." Comp. St. div. 5, § 1486.[19]

The exaction of the statute is that "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year" on the mining claim, in order to continue the lawful holding thereof by the claimant until patent has been issued therefor. The fulfillment of that provision lies in the performance of the labor or the making of the improvements required. Section 2324, Rev. St. U. S. Section 1483 of the fifth division, Compiled Statutes of this state, above quoted, provides a convenient method of preserving *prima facie* evidence of the annual representation of mining claims, by the performance of the labor or making of the improvements, of the value required thereon, by putting such evidence in the form of an affidavit, stating the facts required, and recording the same as provided. This statute relates, not to the effect of doing the work, or making the improvements, as required by law, but to the method of preserving *prima facie* evidence of the fact that such requirement had been fulfilled. Our opinion is that said instruction of the court to the jury states a correct view of said statute. We have carefully examined all the cases cited by appellants' counsel in support of the construction of said statute which he contends for, and find no support for his theory in them. * * *

A careful examination and comparison of the evidence recorded in this case leads us to the conclusion that there is sufficient evidence to justify the verdict. The trial court refused to set aside the verdict and grant a new trial; and, upon consideration of all the grounds assigned therefor, we are of opinion that the order overruling appellants' motion for a new trial, and the judgment, should be affirmed.

[19] In some jurisdictions the statute makes the failure to file a proper affidavit *prima facie* proof that the required labor has not been performed.

(f) *Forfeiture to Co-owner for Failure to Contribute.*

ELDER v. HORSESHOE MINING & MILLING COMPANY ET AL.

1904. Supreme Court of the United States.
194 U. S. 248, 48 L. ed. 960, 24 Sup. Ct. 643.

In error to the Supreme Court of the State of South Dakota to review a judgment which affirmed a judgment of the Circuit Court of Lawrence County in that State, dismissing, upon the merits, a complaint in an action to enforce an alleged trust in an undivided interest in a lode mining claim. *Affirmed.*

Statement by Mr. Justice Peckham:

* * *

In January, 1878, Rufus Wilsey and Charles H. Havens located a mining claim near Bald mountain, in the Whitewood mining district, Lawrence county, South Dakota, by discovering mineral-bearing rock in place, sinking a shaft, posting discovery notices, and planting boundary stakes; and on May 13 of the same year they filed for record their location certificate, which was then recorded. On June 12, 1878, Wilsey died, and soon thereafter the plaintiffs, his heirs at law, were informed of his death. They knew that he had left property, and from a time shortly after his death corresponded with different attorneys and others residing in the Black hills, trying to get something out of the estate; but, until the arrangement was made with the attorneys under which this action is brought, made no progress towards a settlement. From the time of the death of Wilsey, in 1878, up to December, 1893, the heirs of Wilsey did nothing towards contributing or offering to contribute towards paying for the annual labor made necessary by the Federal statute (Rev. St. § 2324, U. S. Comp. St. 1901, p. 1426) in order to keep possession of the mine. * * *

From the time of the location of the mine up to 1888, inclusive, Havens, the co-owner with Wilsey, did at least $100 worth of labor each year in order to hold the claim, and filed on January 2, 1889, an affidavit to that effect, including the time from 1880 to and including the year 1887, and another affidavit to the same effect for the year 1888. Under the statute he published a notice directed to "Rufus Wilsey, his heirs, administrators, and to all whom it may concern," informing them that he had expended $800 in labor upon the mine for the years ending December 31, 1880, 1881, 1882, 1883, 1884, 1885, 1886, and 1887, and stating that if, within ninety days after this notice by publication, they failed to contribute their proportion, $400, being $50 for each of said years, their interest in said claim

would become the property of the subscriber under § 2324 of the Revised Statutes of the United States. Havens also published for the year 1888 a notice similar to the one already given in regard to the work done prior to that year. The two notices were published in the proper newspaper and were set out in full and published in each daily issue of the paper (every day in the week except Sunday), beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889, and no more. Havens also continued, during the years 1889, 1890, 1891, and 1892, to do at least $100 worth of work in the mine for the purpose of holding the same. On August 10, 1892, Havens made a deed of the whole lode and mining claim to one Thomas H. White, and on August 25, 1892, White caused to be filed for record an affidavit of Havens, which recited that he was one of the locators of the Golden Sand lode, and that Wilsey, his co-owner, and whom he advertised out for not contributing his proportion of labor, had not paid his proportion nor any of the expenditures for holding the claim.

Questions were made as to the sufficiency of the notices and as to the regularity of the publication of the same under the above statute of the United States. The case was tried once before and resulted in a judgment for plaintiffs, which was reversed by the supreme court of the state (9 S. D. 636, 70 N. W. 1060) and upon the new trial the judgment was for the defendants. 15 S. D. 124, 87 N. W. 586.

Mr. Justice PECKHAM, after making the above statement of facts[20] delivered the opinion of the court:

The Federal questions which arise in this case are based upon the statute of the United States already referred to in the foregoing statement of facts, being § 2324 of the Revised Statutes, the material portion of which is set forth in the margin.[20a]

The plaintiffs in error contend that the notices published by or in behalf of the defendants in error were not a compliance with the statute because of the manner in which they were addressed. They also insist that, even assuming the sufficiency of the notices, they were not published in accordance with the requirements of the statute for a sufficient length of time, and that, therefore, the title of the plaintiffs in error was not devested. We are not impressed with the validity of either of the two objections.

As to the first. The notice was addressed as follows: "To Rufus Wilsey, his heirs, administrators, and to all whom it may concern." The objection made is that at the time when this notice was published Rufus Wilsey was dead, and there was no administrator then existing, and the names of the heirs were not given, and the notice, "to whom it may concern," was futile.

[20] The statement of facts is abbreviated.

[20a] The section is omitted here. It is found on p. 305, ante.

The statute, it will be observed, does not require that the published notice in regard to a deceased co-owner shall be directed to anyone by name. Upon the failure of a co-owner to contribute his proportion of the expenditure required under the section, the co-owner who has performed the labor or made the improvements may, as provided for by the section at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, and if, at the expiration of ninety days after such notice in writing, or by publication, the delinquent refuses to contribute his proportion or fails to do so, his interest in the claim thereby becomes the property of his co-owners who have made the required expenditures. We perceive no possible harm arising from the fact that the notice itself, containing all the facts necessary to be included therein, was addressed to "Rufus Wilsey, his heirs, administrators, and to whom it may concern." The fact that Rufus Wilsey was dead was not material so far as to thereby render the notice to his heirs illegal or insufficient. It certainly did them no harm to include the name of Rufus Wilsey, and the notice was quite as likely to become known to them as if it had been addressed "to the heirs of Rufus Wilsey, deceased, his administrators, and to all whom it may concern." It is entirely unlike the publication of a summons for the purpose of commencing an action against a particular individual or individuals. There the identification must be complete and the person particularly described and named, so that when the publication has been finished it can be known that the particular individual has been served with process by publication with the same effect as if it had been personally served on the same individual without publication. This statute provides a summary method for the purpose of insuring the proper contribution of co-owners among themselves in the working of the mine, and it provides a means by which a delinquent co-owner may be compelled to contribute his share, under the penalty of losing his right and title in the property because of such failure. It was not necessary, in our judgment, that the notice should specifically name the heirs of the deceased owner. The act does not require it. If the notice be such that the former owner is particularly named and identified thereby, and his heirs are notified by the publication, it is a sufficient notice to them for the purpose of making it necessary for them to comply with the terms of the statute within the time designated therein by the payment of their share of the expenses of working the mine, or else to lose their right, title, and interest therein. The co-owner who did the work might not know who the heirs were, and it might be impossible for him to learn their names or whereabouts, and the statute never contemplated that the man who did the work should be prevented from obtaining the benefit of the statute by his inability to learn who the heirs were and where they lived. A general address to the heirs of the person named,

and the proper publication of the notice, is sufficient. It did not become insufficient because, in addition to being addressed to them, it was also addressed to their intestate by name. An address to a deceased person did them no harm, so long as it was also addressed to them.

The supreme court of South Dakota has held in this case that at the time this notice was published the title to a one-half interest in this claim was in the heirs, subject to a possible lien of the administrator for administration purposes, and had been since the death of Wilsey. 9 S. D. 636, 642, 70 N. W. 1060. The same court has held that an administrator has but a lien on real estate for administrative purposes, and that the title vests in the heirs. (Cases cited in opinion of the state court.) The only debt, so far as the record shows, existing against the estate of Wilsey, was one for $50 in favor of Stevens, who was appointed administrator in 1881, and died in 1888, and from then until 1893 there was no administrator, the present one being appointed evidently for the purpose of this suit. The actual title to the fee is in the government (*Black* v. *Elkhorn Min. Co.* 163 U. S. 445, 449, 41 L. ed. 221, 223, 16 Sup. Ct. Rep. 1101), but the interest of the miner may be conveyed and inherited. (Id. Id.) We are of opinion that the publication of the notice was sufficient, although there was no administrator at the time of publication. It is unnecessary under this statute to publish a notice to lienors. We agree with the supreme court of the state that the evident purpose and object of the law of 1872 (§ 2324) were to encourage the exploration and development of the mineral lands of the United States, and the sale of the same, and that, all the provisions of the law having been framed with that object in view, if the required work is not performed, after the expiration of the year, and notice of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year. When a notice has been rightfully published under the statute it becomes effective in cutting off the claims of all parties, and the title is thus kept clear and free from uncertainty and doubt.

There was no irregularity in grouping in one notice claims for more than one year's expenditures. We can perceive no reason why a consolidation of the claims of several years should not be made and included in one and the same notice.

(2.) The objection to the sufficiency of the publication of the notice we regard as equally unfounded. The statute provides for a publication "for at least once a week for ninety days." The publication was in fact made every day, except Sunday, in the proper newspaper, beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889. And the statute provides that if, after the expiration of ninety days after such notice in writing or publication, such delinquent should fail or refuse to contribute his proportion of the ex-

penditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The publication, we think, was sufficient. The ninety-day period begins with the first publication; in this case, Monday, January 7. The publication on that day was sufficient for the week then beginning. The publication on January 15, was sufficient for that week, and, as stated by the supreme court of South Dakota: "Each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7 to April 1, both inclusive. If no publication was required after the first until the following Monday, none was required after April 1 until the following Monday, April 8, and on that day the period of ninety days had been completed. Including the first day of publication, ninety days ended on Saturday, April 6. Excluding the first day, ninety days ended on Sunday, April 7. On that day the required notice had continued during ninety days, and another publication on Monday, April 8, was wholly unnecessary."

We are satisfied that this construction is the correct one, and the publication was, therefore, made for a sufficient length of time to comply with the statute.

The judgment of the Supreme Court of South Dakota is affirmed.

TURNER v. SAWYER.

(See post, p. 574, for a report of the case.)

HAYNES ET AL. v. BRISCOE.

1901. SUPREME COURT OF COLORADO. 29 Colo. 137, 67 Pac. 156.

ACTION by George Cole Briscoe against William Haynes and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

STEELE, J.[21]—The title to two mining claims, the Bull Domingo and the Bull Domingo No. 2, is involved in this controversy. George Cole Briscoe, the plaintiff, owned 64-90 of the claims, and in 1896 conveyed to his co-owner, Haynes, 19-90 in payment, so he alleges in his complaint, for assessment work done on the claims by Haynes for the year 1895 and to be done for the year 1896. In January,

[21] Part of the opinion is omitted.

1897, Haynes caused to be published in the Pitkin Miner, a newspaper published at the town of Pitkin, a notice of forfeiture because of the alleged failure of Briscoe to contribute his proportion of the expenditures upon the claims for the year 1896; and during the month of August, 1897, the notice and proof of publication, together with an affidavit of Haynes, were recorded in Gunnison county. Haynes having on July 31, 1897, conveyed to the defendants Perreault, McManes, and Roff undivided interests in the claims, they all joined in a lease to the defendant Hallett, a copy of which is set forth in the complaint. The plaintiff, in the complaint, alleges on information and belief that Haynes did not perform the work upon the claims in 1896, or at any time prior to the publication of the notice, and that Haynes, Perreault, McManes, and Roff conspired to cheat and defraud plaintiff of his interest in the claims. The plaintiff further alleges that the said Pitkin Miner was not the newspaper published nearest to said mining claims, and was not a paper in which said notice of forfeiture could legally be published, and that there were other newspapers published nearer the claims than the said Pitkin Miner. The defendants, in their answer, deny the agreement alleged between the plaintiff and the defendant Haynes; allege that Haynes did the assessment work upon the claims for the year 1896, but deny that the work was done for or in behalf of plaintiff; deny a conspiracy; deny that there were newspapers published nearer the claims than the Pitkin Miner. The other allegations of the complaint material to a decision are admitted. The cause was tried by the court, and judgment rendered for the plaintiff. The defendants, except Hallett and the bank, have perfected an appeal to this court. * * *

These claims are located on Italian Mountain, in Gunnison county, and the plaintiff alleged in his complaint that the notice published in the Pitkin Miner was not notice to him, because the statute requires the notice to be published "in the newspaper nearest the claim." Haynes testified that the distance from the claims, by "the usual traveled route," to Pitkin, where the notice was published, is about 41 miles, and that by the usual traveled route it was about 100 miles from the claim to Crested Butte. "You would have to go to Pitkin, and from Pitkin to Gunnison, and from Gunnison to Crested Butte," said the witness. The defendant sought to establish the fact that during the winter and spring of 1897 the nearest place "by the usual traveled route" was Pitkin. The court correctly held, however, that the season of the year cannot be a factor in determining the question, and that, unless the newspaper at Pitkin was the nearest, irrespective of the season or of the condition of the weather, it was not the nearest newspaper, within the meaning of the statute. No decision his been cited construing the words of this statute. There are numerous decisions of the secretary of the interior construing the statute requiring publication of application for patent

(section 2325, Rev. St. U. S.); but we think the two sections are entirely different. The section now under consideration requires that publication be made in "a newspaper published nearest the claim." In the section under consideration by the secretary of the interior in the cases cited, the statute requires publication by the register "in a newspaper to be by him designated as published nearest to such claim." The defendant offered to show that copies of the newspaper were sent to the plaintiff. The court properly refused the offer. The notice must be by publication or by personal service, and personal service cannot be had by sending through the mail a copy of the newspaper in which the notice is published; and proving that the person to whom the notice is directed received the paper is not sufficient.

The act of congress authorizing the procedure whereby the property of the co-owner is forfeited must be strictly construed; and the defendants, upon whom was the burden of proof, having failed to show that the Pitkin Miner was the newspaper "published nearest to the claim," it follows that the service and subsequent acts were void, and that the plaintiff is the owner of an undivided one-half of the Bull Domingo and Bull Domingo No. 2 claims, and entitled to possession. In this construction of the statute my associates do not concur. They are of opinion that the notice itself is fatally defective, in that it does not specify the amount of money spent upon each claim, nor the facts which might excuse expenditure upon each claim. All the members of the court agree that the case should be affirmed. My associates do not place upon the statute a different construction than that mentioned in the opinion, but base their judgment of affirmance upon the grounds mentioned. I do not insist that the notice is sufficient, but think the judgment should be affirmed upon the theory adopted by the trial court.

The judgment of the district court is affirmed.

Affirmed.

ROYSTON v. MILLER et al.

1896. Circuit Court, D. Nevada. 76 Fed. 50.

Hawley, District Judge (orally).[22]—This is a suit in equity for an acounting and for partition of a group of mining claims known as the "Kingston Mines," situated in Victorine mining district, Lander county, Nev., and of the "Irvine Tunnel," run for the purpose of prospecting and developing said mining claims. This group consists of four different claims, known as the "Provider," the

[22] Parts of the opinion are omitted.

"Morse," the "California," and the "Chicago." The first three are contiguous. The Chicago is separated from them by the "Victorine," a patented mining claim owned by other parties. Prior to October, 1891, George E. Spencer and J. C. Irvine were co-owners of the property involved in this suit. During that month, Spencer conveyed to his wife, Mrs. William Loring Spencer, his entire interest in the property. On September 1, 1893, Mrs. Spencer conveyed her interest therein to complainant. The interest of defendant Miller is in the nature of a trustee for the defendant Irvine.

There is a controversy between the parties as to their respective interests in a portion of said property, and also upon the question as to whether the property can be divided without material injury. But the defendants contend that the grantors of complainant forfeited all their rights to the property by a failure on their part to perform or contribute their proportion of the assessment work upon said claims for the year 1893, and especially of the Chicago claim for the year 1892. This question of alleged forfeiture will be first considered. The evidence shows that the co-owners, from the year 1888, when they commenced to run the Irvine tunnel, up to 1892, performed more than sufficient work to hold all the claims each year; that during all this time, up to the time Spencer disposed of his interest, Irvine was the agent of Mr. Spencer in performing the work and caring for the property; and that Spencer relied upon and trusted him to properly do the necessary amount of assessment work upon each of said claims. In the year 1892, more than $1,000 worth of work and labor was done and performed on the Irvine tunnel; and this was done, as in previous years, for the express purpose of holding all of the claims,—the Chicago as well as the three others that were contiguous to each other. The relations existing between Spencer and Irvine, when the work was done upon the tunnel, prior to August, 1892, were friendly and fiduciary in their character. During that month, for reasons unnecessary to state, the friendly relations ceased; and thereafter Irvine, on his own account, performed the necessary amount of work on the Chicago claim to hold it for the year 1892. In 1893, Irvine did sufficient work on the Irvine tunnel, prior to November 3d, to hold all of said claims. Mrs. Spencer, who had succeeded to the interests of her husband in the property, had employed a man to work jointly with her son to do her proportion of the assessment work for that year. But, at the time the work was done by Irvine, she was engaged in attending to the crops on a ranch in the vicinity of the mines, and expressed her desire not to commence the assessment work on the tunnel until the work then being done upon the ranch was finished, and which would still give plenty of time to perform the assessment work for that year. In the meantime (after Irvine had completed the work), she learned of the passage of the amendatory act to section 2324 of the Revised Statutes of the

United States, and availed herself of its provisions by complying therewith, and did not either perform any assessment work on the claims, nor contribute her proportion of the work and labor done and performed by Irvine. Irvine, having performed the necessary assessment work, published the demand and notice for contribution, as provided for by section 2324, for the period of 90 days beginning January 27, 1894, and made proof of the publication and demand, and had the same duly recorded.

Was the interest of Spencer forfeited by his failure to contribute to the assessment work done by Irvine on the Chicago claim in 1892? Did complainant's grantor forfeit her interest in the contiguous group of mining claims by her failure to do any work, or to contribute her proportion for the work done by Irvine, in 1893?

Section 2324, among other things, provides as follows:

"Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

On the 3d day of November, 1893, section 2324 was amended as follows:

"That the provisions of section 2324 of the Revised Statutes of the United States which require that on each claim located after the 10th day of May, 1872, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year 1893, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year 1893: provided, that the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December 31st, 1893, a notice that he or they, in good faith intend to hold and work said claim." 28 Stat. 6.

1. The work done upon the Irvine tunnel in 1892, as well as in the previous years, was wholly insufficient to constitute a compliance with the provisions of section 2324 as to the amount of the annual assessment work to be performed on the Chicago claim. It was only sufficient to hold the three mining claims that were contiguous, viz. the Provider, Morse, and California. Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428; Mining Co. v. Callison, 5 Sawy. 440, 457, Fed. Cas. No. 9,886. The construction and policy of the statute in this respect was to require every per-

son asserting an exclusive right to a mining claim to expend something of labor or value upon it, as evidence of his good faith.

In Chambers v. Harrington, the court said:

"When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive to be done on one of them. But, obviously, on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such cases the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them."

Undoubtedly, a third party could have made a valid location of the Chicago claim by reason of the failure of the owners to do the assessment work for 1892, and could have obtained a valid title thereto by a compliance with the mining laws. But the question whether one of the co-owners could, under the facts of this case, obtain any right as against the other co-owners in the claim, rests upon an entirely different principle. The necessary work was done upon the tunnel by Irvine, for himself and as agent of the others, under the mistaken idea that the work so done was sufficient to hold the four claims. Irvine reported that sufficient work had been done to hold all the claims. It was his duty to do the necessary work to hold each claim. He could not take advantage of his own wrong. By doing the extra work on the Chicago he did not gain any right for himself which he could set up against his co-owners in the claim. * * *

2. With reference to the work done in 1893: The contention of the defendants is that Irvine had a vested right to contribution from his co-owner upon his completion of the annual assessment work for that year, and that, such co-owner having failed to contribute her proportion, and Irvine having given the notice and demand for the required time, at the end of 90 days, thereby became the owner of the property. The contention of complainant is that, when congress suspended the forfeiture clause for nonperformance of the annual assessment work for the year 1893, no such rights to such forfeiture existed, and no forfeiture could thereafter be enforced between the co-owners for the work previously done by Irvine, and that the only remedy would be an action for contribution between the co-owners for expenditures incurred or made for the common benefit of all the owners. Which contention is correct? Under the statute as it existed prior to the amendment, the owners of mining claims had until December 31, 1893, to do the annual assessment work. It cannot, therefore, be said that any vested right to forfeiture occurred, or could occur, prior to the expiration of that time. A vested right is property arising from contract or from the principles of the common law, which cannot be destroyed, divested, or impaired by legislation. In cases

where a contract is made and executed in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is a part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made. But imperfect and inchoate rights are subject to future legislation, and may be extinguished while in that condition. At the time Irvine completed the assessment work, he did not have such a vested right of recovery by contract as prevented congress from repealing or suspending the provisions of the statute in so far as it provided for a forfeiture. The suspension of the provisions of the statute requiring annual work to be done necessarily suspended the right of forfeiture. The forfeiture imposed by the statute was for failing to do the work which the law then required to be done. The suspendatory or amendatory act provided that the work hitherto required need not be done in 1893, and hence it follows that the right of forfeiture could not thereafter exist for any act omitted in that respect during that year. The enforcement of a forfeiture cannot be had when the law excuses the performance of the condition. The general rule is that statutes providing for forfeitures must be strictly construed. They are, to that extent, analogous to penal statutes; and the rule is well settled that actions on statutes in their nature penal, pending at the time of the repeal of such statutes, cannot be further prosecuted after such repeal unless the repealing act, in terms, saves the right to prosecute pending suits. There is no such thing as a vested interest in an unenforced penalty or forfeiture. Norris v. Crocker, 13 How. 429; U. S. v. Claflin, 97 U. S. 546, 553; Railroad Co. v. Grant, 98 U. S. 398, 401; U. S. v. Auffmordt, 122 U. S. 197, 209, 7 Sup. Ct. 1182; Id., 19 Fed. 893; Bank v. Peters, 144 U. S. 570, 12 Sup. Ct. 767; Iron Co. v. Pierce, 4 Biss. 327, Fed. Cas. No. 14,367; Lamb v. Schottler, 54 Cal. 319, 325; Railway Co. v. Crawford, 11 Colo. 598, 19 Pac. 673; Railroad Co. v. Austin, 21 Mich. 390, 397; Gregory v. Bank, 3 Colo. 332, 336. In support of the text that "the repeal of a statute prescribing a penalty or forfeiture recoverable in a civil action takes away the right of recovery," numerous authorities are cited in 23 Am. & Eng. Enc. Law, 509, and it is there stated that there is no vested right in the penalty or forfeiture until recovery has been had by final judgment. It is fair to presume that congress intended the amendatory act to apply to all cases, and to release the owners from any forfeiture where the amount of annual work had been done by one of the co-owners before the passage of the amendatory act, as well as to the failure of doing the work after the passage of the amendment; otherwise, a proviso should, and doubtless would, have been inserted to the effect that the amendment should not apply to cases

where the annual work had been done, so as to deprive such co-owner of the right to have the interest of his co-owner, who failed to contribute, forfeited. The amendatory act, in fact, suspended the statute for the year 1893; and, the statute being suspended, there could be no forfeiture. There being no contractual relations between the parties to be impaired by such an amendment, and no vested right having accrued to Irvine, it was within the power of congress to pass the act, and it is the duty of the court to uphold it. The contention of the defendants cannot be sustained.[23] * * *

4. The next question is whether the court should decree a sale or order a partition of the property. The statutes of Nevada provide that:

"When the action is for partition of a mining claim among the tenants in common, joint tenants, co-parceners or partners thereof, the court, upon good cause shown by any party or parties in interest, may, instead of ordering partition to be made in manner as hereinbefore provided, or a sale of the premises for cash, direct the referees to divide the claim in manner hereinafter specified." Gen. St. Nev. § 3334.

The defendants contend, and the evidence on their behalf tends to show, that the Kingston group of mines, which are contiguous, can only be economically worked through the Irvine tunnel; that this tunnel is run upon the Morse ground, near the center of the location; that it has but one track; that two companies could not work through the same tunnel; and that no division could be made that would not be detrimental to both parties. On the other hand, it is argued by complainant—and the testimony on her behalf tends to support the argument—that a division can be made without injury to the parties; that her interest would be jeopardized by a sale of the property, as she is possessed of limited means, and the defendants would be in a position to purchase the property on their own terms; and that the only practicable way to develop the property is by an incline, instead of through the tunnel. The evidence shows that it would cost in the neighborhood of $3,000 to complete the tunnel in order to reach the lode. There is no evidence as to the particular value of either of the mining locations, except that, in the opinion of some of the witnesses, the Morse is more valuable than the others. The reasons given by the respective witnesses upon these questions are of about equal weight. This

[23] The courts will go far to prevent a forfeiture. "A tender to a part owner of a mining claim of a sum which he claimed to be due him for assessment work from a co-tenant, made by a friend of the latter for the purpose of preventing a forfeiture of his rights under the statute, although not authorized at the time, is valid and effective, where it was ratified at once when made known to the person in whose behalf it was made." Syllabus to Forderer v. Schmidt, 84 C. C. A. 426, 154 Fed. 475.

being true, it is the duty of the court to follow the course which the law favors. In section 1390, 3 Pom. Eq. Jur., the question is discussed at some length, and it is there said that, "as between a sale and a partition, however, the courts will favor a partition, as not disturbing the existing form of the inheritance." See, also, Mitchell v. Cline (Cal.) 24 Pac. 164, 166. A partition of the property will therefore be ordered.

Let a decree be drawn in accordance with the views expressed in this opinion.

Section 2. Forfeiture by Relocation.

FEDERAL STATUTE.

Sec. 2324. * * * On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Rev. St. U. S. § 2324.

SHOSHONE MIN. CO v. RUTTER ET AL.

1898. CIRCUIT COURT OF APPEALS. 31 C. C. A. 223, 87 Fed. 801.

APPEAL from the Circuit Court of the United States for the Northern Division of the District of Idaho.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge.[24]—This is a suit in equity brought under the provisions of section 2326 of the Revised Statutes to determine the rights of the respective parties to certain mining ground situated in Yreka mining district, Shoshone county, Idaho. On August 21, 1895, appellant applied for a patent to the Shoshone lode claim. Appellees thereafter filed their protest and an adverse claim against said application, and in due time commenced this suit in support of their claim in the circuit court of the United States for the district of Idaho. * * *

3. This brings us to a consideration of the case upon its merits. It appears from the record that appellees first located a claim on a

[24] Part only of the majority opinion is given and the dissenting opinion of Gilbert, Circuit Judge, is omitted.

portion of the ground in dispute, under the name of the "Edith Mining Claim," and recorded the same; that thereafter, before any right of the appellant was made to the ground, the locators of the Kirby Fraction mining claim made a location "on top of the Edith," and also included more ground. These locations were made by the same parties. The Edith was located June 10, 1886, embracing 1,200 feet on the lode; the Kirby, on July 11, 1886, claiming 1,400 feet. Jacob Johns, one of the locators, testified that after the location of the Edith he found more ground, "and located another claim right over it. It was all our property, anyhow, so we located over it,—right over the top of the Edith. The location of the Edith was completed before the Kirby was located. * * * I intended to hold both the Edith and Kirby locations." In the conveyances made by the locators, they mentioned the Edith as well as the Kirby claim. Upon these facts appellant contends that, if the Edith location was valid, the Kirby location is void; that the appellees cannot recover upon the Edith title, because they have not set up any title to that claim in their bill; that they cannot recover upon the Kirby title without showing an abandonment of the Edith location. In considering these questions it must be remembered that the Kirby was located long prior to the Shoshone claim. The evidence does not show that the ground covered by the Edith location was intended to be abandoned, but it does show that the original locators of the Edith concluded to change the boundaries by adding more ground, and gave a new name to their claim. The locators had the right to do this, as long as they did not interfere with the rights of other parties. The fact that the Edith was mentioned in the conveyances does not prove that the parties relied upon the title under that name. A conveyance of the ground by metes and bounds, by any name of the claim, would be valid and effective. The name is generally used to designate or identify the claim, but it may be designated or identified by the use of one, or more than one, name, if it is known or called by different names. There is no statute, law, rule, or regulation which prevents locators of mining claims from relocating their own claim, and including additional vacant ground, unclaimed by other parties, under a different name, and conveying it by the designation of the last name. In Weill v. Mining Co., 11 Nev. 200, 210, where the facts were in some respects similar to the case in hand, there were two locations made by the same parties, known, respectively, as the "Boston" and the "Lucerne." The Boston was located prior, and the Lucerne subsequent, to the location of the Waller's Defeat, owned by the plaintiff. The question was whether the defendant obtained any title to the Boston ground under a deed conveying the same by the name of the "Lucerne Company's Claims." The court said:

"If the Boston notice and the Lucerne notice were posted upon and claimed the same lode, a conveyance of his interest in the lode necessarily conveyed his

interest in both locations, and it was immaterial by what particular name he designated it. Phillpotts v. Blasdel, 8 Nev. 61."

* * *

The decree in each case is affirmed, with costs.[25]

WARNOCK v. DE WITT.

1895. Supreme Court of Utah. 11 Utah 324, 40 Pac. 205.

Action by Robert Warnock against Reuben De Witt. Judgment for defendant, and plaintiff appeals. Affirmed.

Smith, J.—Without going into a statement of the facts, we may say that the record presents two questions for our determination on this appeal, and no more. They are: First. Can the locator of a quartz mining claim, who has allowed his location to lapse by a failure to perform the necessary work, make a relocation, or new location, covering the same ground? Second. Does the evidence show that the location made by Miles Durkee on January 1, 1887, was sufficiently marked upon the ground to render it a valid location? Plaintiff claims under a location made January 17, 1887.

The first question arises wholly upon the construction of section 2324, Rev. St. U. S. This section, after providing that a certain amount of work shall be performed annually upon each mining location, provides: "Upon a failure to comply with the foregoing conditions of annual expenditure the claim or mine upon which such failure occurred, shall be open to relocation in the same manner as if no location of the same had ever been made: provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

We have been referred to no decision of any court that has decided the question here presented. The right of a locator to make a new location upon mining ground, after his first location has lapsed, is recognized in the case of Hunt v. Patchin, 35 Fed. 816; and in Copp, U. S. Min. Dec. p. 300, it is declared that a prior locator has such right. See, also, 15 Am. & Eng. Enc. Law, p. 551. We fail to see any reason why such right should be denied. The fact that a prior locator, after his right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator, but, to give the proviso above quoted the effect claimed by appellant, would be to deny to such prior locator a substantial right allowed to

[25] On several locations of one claim see also Bergquist v. West Virginia-Wyoming Co., ante, p. 240.

strangers. In other words, such a construction, while it would allow to a prior locator the right to resume work, would destroy his right to make a new location. We do not think the proviso to the act should be construed to mean anything more than that a prior locator, in addition to the rights of a stranger, should also have the right to resume work, and thus relieve himself from the forfeiture incurred. This was the view taken by the court below, and we think it correct.

The second question is largely one of fact. There was proof tending to show that on the day that Durkee made his location, to wit, January 1, 1887, he and his assistant, in addition to the discovery monument, on which was placed the notice of location, erected a monument or stake at each of the three corners of the claim, and also placed a monument at the center of each end line. At the remaining corner no stake or monument was placed until the 17th of January, 1887, being the day on which plaintiff made the location under which he claims. The court below held that the claim was properly located and marked. So far as there was a conflict in the evidence, we cannot disturb the finding of the trial court. Its opportunities for coming to a correct conclusion were certainly better than ours. Assuming, therefore, that three corners, the center of two end lines, and the point of discovery were appropriately marked, the question arises, is such marking, of necessity and as matter of law, insufficient? We think not. The statute is: "The location must be distinctly marked on the ground so that its boundaries can be readily traced." Rev. St. U. S. § 2324. It will be observed that the statute nowhere requires that the boundaries be marked. The requirement is that the location be marked so the boundaries can be traced. We think that where the notice of location gives the length and breadth of the claim from the discovery monument, and three corners are properly marked, and the centers of both end lines are also properly marked, there ought to be no difficulty in tracing the entire boundary, under ordinary circumstances. At any rate, there is nothing in this case to indicate that it could not be easily traced, unless it be inferred from the fact that there was a corner post missing. We are of the opinion that the court below properly concluded that the claim was sufficiently marked. We find no error in the record. The judgment in favor of defendant and the order denying a new trial are affirmed.[26]

[26] For a criticism of this case see Costigan, Mining Law, 327–330. And compare the abandonment case of McCann v. McMillan, post, p. 390.

BELK v. MEAGHER.

1881. SUPREME COURT OF THE UNITED STATES.
104 U. S. 279, 26 L. ed. 735.

Mr. Chief Justice WAITE delivered the opinion of the court.[27]

This is an action of ejectment brought by Belk, the plaintiff in error, to recover the possession of a certain alleged quartz lode mining claim, being, as is stated in the complaint, "a relocation of a part of what is known as the old original lode claim." Passing by for the present the exceptions taken to the rulings of the court at the trial on the admission and rejection of testimony, the facts affecting the title of the respective parties may be stated as follows:—

In July or August, 1864, George O. Humphreys and William Allison located the discovery claim on the original lode and claims one and two west of discovery. These locations were valid and subsisting on the 10th of May, 1872, and no claim adverse to them then existed. No work was done on them between that date and June, 1875. During the month of June, 1875, and before any relocation had been made, the original locators, or their grantees, resumed work upon the claims, and did enough to re-establish their original rights, if that could be done by a simple resumption of work at that time. No work was afterwards done on the property by the original locators, or any one claiming under them; and it does not appear that they were in the actual possession of the claims, or any part thereof, on the 19th of December, 1876, or for a long time before. It is conceded by both parties that the original claims lapsed on the 1st of January, 1877, because of a failure to perform the annual work required by the act of Congress in such cases.

On the 19th of December, 1876, Belk made the relocation under which he now claims, and did all that was necessary to perfect his rights, if the premises were at that time open for that purpose. His entry on the property was peaceable, no one appearing to resist. Between the date of his entry and the 21st of February, 1877, he did a small amount of work on the claim which did not occupy more than two days of his time, and probably not so much as that, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On the 21st of February, 1877, the defendants entered on the property peaceably and made another relocation, doing all that was required to perfect their rights, if the premises were at the time open to them. The possession they had when this suit was begun was in connection with the title they acquired in that way.

Upon this state of facts the questions presented in argument for our consideration are,—

[27] Parts of the opinion are omitted.

1. Whether the work done in June, 1875, was sufficient to give the original locators, or those claiming under them, an exclusive right to the possession and enjoyment of the property until January 1, 1877.

2. Whether, if it was, a valid relocation of the premises, good as against everybody but the original locators or their grantees, could be made by Belk on the 19th of December, 1876, his entry for that purpose being peaceful and without force.

3. Whether, if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed; and,

4. Whether, even if the relocation of Belk was invalid the defendants could, after the 1st of January, 1877, make a relocation which would give them as against him an exclusive right to the possession and enjoyment of the property, their entry for that purpose being made peaceably and without force. * * *

The argument on the part of the plaintiff in error is that, if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law. His rights after resumption were precisely what they would have been if no default had occurred. * * *

It follows that on the 19th of December, 1876, the owners of the original location had, under the act of Congress, the exclusive right to the possession and enjoyment of the property in dispute.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. Forbes v. Gracey, 94 U. S. 762. There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this policy it was enacted by sect. 9 of the act of February 27, 1865, c. 64 (13 Stat. 441, Rev. Stat., sect. 910), that no possessory action between individuals in the courts of the United States for the recov-

ery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession.

Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allowed it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. It follows that the relocation of Belk was invalid at the time it was made, and continued to be so until January 1, 1877.

The next inquiry is, whether the attempted location in December became operative on the 1st of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry. As the United States could not at the time give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of Congress. A location to be effectual must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession. As the proceeding to locate is one in which the United States is not directly an actor, but is carried on by the locator alone, so that he may take what the United States has, through an act of Congress, offered to give, it is clear that there can be nothing to take until there is an offer to give. Here Congress has

said in unmistakable language that what has been once located under the law shall not be relocated until the first location has expired, and it is difficult to see why, if Belk could make his relocation on the 19th of December, he might not on the 19th of January before. Lansdale v. Daniels, 100 U. S. 113, 116. The original locators and their grantees had precisely the same rights after each date, the only difference being in duration. To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a relocation, will be to encourage unseemly contests about the possession of the public mineral-bearing lands which would almost necessarily be followed by breaches of the peace.

This brings us to the inquiry whether the possession of Belk, after the 1st of January, was such as to prevent the defendants from making a valid relocation and acquiring title under it. The position taken in his behalf is, that even if the original locators, or their grantees, had, under the act of Congress, a right to the possession of their claim until January 1, a statute of limitations in Montana would bar their action against him for its recovery, because they had not been in actual possession within a year previous to his entry, and consequently his entry, though tortious as to them, was good as the beginning of an adverse possession, which, if continued for a year, would entitle him to a patent under the provisions of sect. 2332 of the Revised Statutes. * * *

No one contends that the defendants effected their entry and secured their relocation by force. They knew what Belk had done and what he was doing. He had no right to the possession, and was only on the land at intervals. There was no enclosure, and he had made no improvements. He apparently exercised no other acts of ownership, after January 1, than every explorer of the mineral lands of the United States does when he goes on them and uses his pick to search for and examine lodes and veins. As his attempted relocation was invalid, his rights were no more than those of a simple explorer. In two months he had done, as he himself says, "no hard work on the claim," and he "probably put two days' work on the ground." This was the extent of his possession. He was not an original discoverer, but he sought to avail himself of what others had found. Relying on what he had done in December, he did not do what was necessary to effect a valid relocation after January 1. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough, as we think, to prevent an entry peaceably and in good faith for the purpose of securing a right under the act of Congress to the exclusive possession and enjoyment of the property. The defendants having got into possession and perfected a relocation, have secured the better right. When this suit was begun they had not only possession, but a right granted by the United States to continue their possession against all adverse claim-

ants. The possession by Belk was that of a mere intruder, while that of the defendants was accompanied by color of title. * * *

Upon a careful consideration of the whole case we find no error. Judgment affirmed.

LAVAGNINO v. UHLIG.

1905. Supreme Court of the United States.
198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. 716.

In error to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of a District Court in and for the County of Salt Lake, in that state, in favor of defendants in an action to try title to conflicting mining claims. *Affirmed.*

Statement by Mr. Justice White:

Uhlig and McKernan, two of the defendants in error, by locations alleged to have been made on January 1, 1889, asserted ownership of two adjacent mining lode claims, designated respectively as the Uhlig No. 1 and the Uhlig No. 2, situated in the West mountain mining district, in Salt Lake county, state of Utah. In the month of August, 1898, the parties named filed in the proper land office an application for patent for said claims. During the publication of notice of the filing of the application, Giovanni Lavagnino, plaintiff in error,—as the alleged owner of a mining lode claim called the Yes You Do,—filed an adverse claim to a portion of the land embraced in each of the Uhlig locations, which it was asserted overlapped the Yes You Do. Thereupon, pursuant to the requirements of § 2326 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1430), this action was brought in a district court of Salt Lake county, Utah, to determine in whom was vested the title and right of possession to the conflicting areas, which, in the case of the Uhlig No. 1, claim, amounted to 6.374 acres and in the No. 2 to 1.441 acres.

In substance, Lavagnino alleged in his complaint that, at the time of the location of the Uhlig claims, there was a subsisting valid location known as the Levi P. lode claim, which included within its areas the land in dispute in the action; that the necessary labor required by the statutes of the United States was performed upon the claim up to and including the year 1896; that no actual labor or improvements were made upon the claim for the year 1897, and, in consequence, all the land included within the Levi P. location became forfeited, and acquired the status of unoccupied and mineral lands of the United States, and that while such was the status of the land, on January 1, 1898, one J. Fewson Smith, Jr.,—the grantor of Lavagnino,—re-

located the Levi P. claim as the Yes You Do, and that thereafter all the requirements necessary to be done had been performed, and the Yes You Do was then a valid and subsisting location.

Subsequently the St. Joe Mining Company was substituted in the stead of Uhlig, as a party defendant.

On the trial it was shown that at the time Smith located the Yes You Do claim he was a deputy mineral surveyor for the district in which such mining claim was situated, and that he made the survey and plat for the protest which had been filed in the land office against the Uhlig application for patent. On the offer, as evidence for the plaintiff, of the notice of location of the Yes You Do claim and the deed from Smith to Lavagnino, objection was made to their admission, and the offered evidence was excluded upon the ground that the asserted location by Smith of the Yes You Do was not valid, because, at the time of the making thereof, Smith was a deputy mineral surveyor, and was prohibited by the terms of § 452 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 257), from making the location of a mining lode claim. For the same reason the trial court sustained an objection to evidence offered on behalf of the plaintiff tending to show that, at the time the Uhlig claims were located, the ground covered by such locations was then covered by prior locations made at an earlier hour on the same day, and was consequently not subject to location as unoccupied mineral lands of the United States. That one of said locations—the Levi P. —embraced the premises in dispute, and was a subsisting location until forfeited by failure to perform the annual work for the year 1897; that the relocation of said claim as the Yes You Do was made on January 1, 1898; and that the annual work and other steps required by law to be done in connection with the claim had been performed.

Following the introduction of testimony tending to show the validity of the Uhlig locations, testimony was introduced on behalf of the plaintiff in respect to the location and working of the Levi P. claim; but, on the offer of the Levi P. location notice, the trial court sustained an objection thereto, and ruled that, as the Yes You Do was not a valid location, there were no adverse claims before the court, and as a result it was to be conclusively presumed that there did not exist any location which in anywise conflicted with the Uhlig claims sought to be patented.

The court made findings of fact, in which, *inter alia,* it was recited that the plaintiff at the trial had not introduced any legal or competent evidence to sustain the issues on his part, and consequently that "upon the trial, on motion of counsel for defendants, the said action of the plaintiff against the defendant was, and is hereby, dismissed." The facts were then found in respect to the location and working of the Uhlig claims, and, as conclusions of law, the court held that the action against the defendants should be dismissed

with costs, and that the defendant the St. Joe Mining Company, and the defendant Alexander McKernan, were entitled to purchase from the United States of America the said Uhlig claims and the whole thereof, and were also entitled to a decree quieting their title to the premises in dispute. From a decree entered in conformity to these conclusions an appeal was prosecuted to the supreme court of Utah, and that court affirmed the decree. 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046. A writ of error was thereupon sued out from this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the court:[28]

The supreme court of Utah was of the opinion that, by force of § 452 of the Revised Statutes of the United States (copied in the margin[28a]), J. Fewson Smith, Jr., being a deputy mineral susveyor, was disqualified from locating the Yes You Do claim: that in consequence the attempted location of such claim was void; and that the plaintiff, Lavagnino, acquired no rights by the conveyance of the claim to him by Smith. It was next decided that, as the plaintiff had failed to show any right to the disputed premises, he became a stranger to the title, and was without right to contest the claim of the defendant. The correctness of the decree entered by the trial court was also held to result from the terms of § 2332 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1433, and § 2859 of the Revised Statutes of Utah, both of which sections are copied in the margin.

Adopting the finding of the trial court that the Uhlig claims were valid locations, attention was called to the fact that those claims were located on January 1, 1889, while the Yes You Do was located more than eight years thereafter; *viz.*, on January 1, 1898. A mining claim was declared to be a possessory right and real estate under the statutes of Utah, and it was held that one Mayberry, the locator of the Levi P. claim, not having instituted a suit to recover possession of the premises in dispute within seven years after the location of the Uhlig claims, was barred of all right to such premises by the terms of § 2859 of the Revised Statutes of Utah, and that his right to contest the title of the defendants to the conflict areas "was also waived by his failure to adverse the application for a patent of the Uhlig Nos. 1 and 2." The court added: "In view of these facts the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United States mineral surveyor, as the location of the 'Yes You Do' was not made until eight years after the possession of the Uhlig Nos. 1 and

[28] Part of the opinion is omitted.

[28a] "The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office." Rev. St. U. S., § 452.

2 was begun, could not avail himself of any rights which the said Mayberry may have had."

This latter ruling of the supreme court of Utah forms the basis for the first of two grounds of a motion to dismiss this writ of error, which motion will now be passed upon. * * * The motion to dismiss is, therefore, overruled.

The question then is, Did the supreme court of Utah err in affirming the decree of the trial court?

As we have seen, the supreme court of Utah, in part, rested its conclusion upon the want of power in a deputy mineral surveyor to make the location in question, in consequence of the prohibition contained in § 452 of the Revised Statutes. A consideration of that subject, however, will be unnecessary if it be found that even if a deputy mineral surveyor was not within the restriction of the section referred to, nevertheless, the rights asserted under the Yes You Do location in the adverse proceeding were not paramount to the rights arising from the Uhlig location. We, therefore, come at once to a consideration of that question, and, of course, in doing so assume, for argument sake, that the section of the Revised Statutes relied upon and the rules and regulations of the Land Department did not prohibit a deputy mineral surveyor from making a location of mineral land. And, moreover, in considering the question which we propose to examine, we concede, for the sake of argument, that the Levi P. location, of which the Yes You Do purported to be a relocation, was prior in date to the location of the Uhlig Nos. 1 and 2, and that there were areas in conflict between them. With all these concessions in mind, the question yet remains whether Smith and his transferee, in virtue of the location of the Yes You Do, stood in such a relation as to enable them, or either of them, to successfully adverse the application for patent made by the owners and possessors of the Uhlig locations.

It is undoubted that this court in a number of cases has declared that the rights of a subsisting senior locator of mineral land are paramount to those of the owner of a junior location, so far as said junior location conflicts in whole or in part with the prior location. *Clipper Min. Co.* v. *Eli Min. & Land Co.* 194 U. S. 220, 226, 48 L. ed. 944, 949, 24 Sup. Ct. Rep. 632, and cases cited. It is elementary, also, that the power conferred by § 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and forfeited location. The statute merely provides that when a forfeiture has been occasioned, "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The question then is, where there was a conflict of boundaries

between a senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?

To say that the relocator had such right involves, necessarily, deciding that, as to the area in conflict between the junior and the senior locations, the junior could acquire no present or eventful right whatever, and that, on the abandonment or forfeiture of the senior claim, the area in conflict became, without qualification, a part of the public domain. In other words, the proposition must come to this: that as the junior locator had acquired no right whatever, present or possible, by his prior location, as to the conflicting area, he would be obliged, in order to obtain a patent for such area, to initiate in respect thereto a new right, accompanied with a performance of those acts which the statute renders necessary to make a location of a mining claim.

The deductions just stated are essential to sustain the right of the relocator of a forfeited mining claim to contest a location existing at the time of the relocation, on the ground that such existing location embraced an area which was included in the forfeited and alleged senior location, for the following reasons: If the land in dispute between the two locations, which antedated the relocation, did not, on the forfeiture of the senior of the two locations, become unqualifiedly a part of the public domain, then the right of the junior of the two would be operative upon the area in conflict on a forfeiture of the senior location. If it had that effect it necessarily was prior and paramount to the right acquired by a relocation of the forfeited claim.

But we do not think that the deductions which we have said are essential to sustain the right of the relocator to adverse, under the circumstances stated, can be sustained consistently with the legislation of Congress in relation to mining claims. Indeed, we think such a construction would abrogate the provisions of § 2326 of the Revised Statutes, which is as follows:

"Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall

have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice, and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights and cause them in effect to inure to the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse.

It cannot be denied that under § 2326, if, before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adversed the application, upon an establishment of a prima facie right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. *Gwillim* v. *Donnellan*, 115 U. S. 45, 51, 29 L. ed. 348, 350, 5 Sup. Ct. Rep. 1110. And the same result would have arisen had the owner of the Levi P. adversed the application for a patent based upon the Uhlig locations, and failed to prosecute, and waived such adverse claim.

In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not

unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location, and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver, if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete.

Of course the effect of the construction which we have thus given to § 2326 of the Revised Statutes is to cause the provisions of that section to qualify §§ 2319 and 2324 (U. S. Comp. Stat. 1901, pp. 1424, 1426), thereby preventing mineral lands of the United States which have been the subject of conflicting locations from becoming, *quoad* the claims of third parties, unoccupied mineral lands by the mere forfeiture of one of such locations.

In text books (Barringer & A. Mines & Mining, p. 306; Lindley, Mines, 2d ed. pp. 650, 651), statements are found which seemingly indicate that, in the opinion of the writers, on the forfeiture of a senior mining location, *quoad* a junior and conflicting location, the area of conflict becomes, in an unqualified sense, unoccupied mineral lands of the United States, without inuring in any way to the benefit of the junior location. But, in the treatises referred to, no account is taken of the effect of the express provisions of Rev. Stat. § 2326. Moreover, when the cases to which the text writers referred, as sustaining the statements made, are examined, it will be seen that they were decided either before the passage of the adverse claim of statutes of 1872, or concerned controversies between the senior and junior locators, or depended upon the provisions of state statutes. How far such statutes would be controlling, we are not called upon to say, as it is not claimed that there is any statute in Utah in any way modifying the express provisions of § 2326.

As the issue raised by the complaint in this action concerned only the conflict areas, and, on the trial, the invalidity of the Uhlig locations, in respect to the premises in dispute, was attempted to be established solely by proof that the Levi P. was an antecedent location, and embraced the grounds in conflict, it follows, from the opinion which we have expressed, that, at the time when Smith located the Yes You Do claim as a relocation of the Levi P. claim, the land embraced within the location notices of the Uhlig claims, and upon which the Yes You Do overlapped, was not unoccupied mineral lands of the United States, and was consequently not subject to be relocated by Smith, even under the mere hypothesis which we have indulged in, that, as a deputy mineral surveyor, he was not debarred from making the location. For this reason *the judgment*

of the Supreme Court of Utah was right, and it must therefore be affirmed.

Mr. Justice BREWER concurs in the result.

Mr. Justice MCKENNA dissents.

OSCAMP v. CRYSTAL RIVER MIN. CO.

1893. CIRCUIT COURT OF APPEALS. 7 C. C. A. 233, 58 Fed. 293.

IN Error to the Circuit Court of the United States for the District of Colorado.

At Law. Action of ejectment brought by Alfred Oscamp against the Crystal River Mining Company. Verdict and judgment for defendant. Plaintiff brings error. Reversed.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge.[29]—The question presented by this record appears to be one of first impression, and arises out of the following facts: The plaintiff in error is the owner of an undivided one-third part of the Excelsior No. 1 lode mining claim, hereafter called the "Excelsior Claim," situated in the Elk Mountain mining district, Gunnison county, Colo. The defendant in error is the owner of the Black Queen lode mining claim, hereafter termed the "Black Queen," which is situated in the same district, county, and state. Of these claims the Excelsior is founded upon the earlier location. Both claims are rectangular in shape, and, as originally laid upon the surface of the earth, the north side line of the Black Queen runs diagonally across the southwest corner of the Excelsior claim, and cuts off from the latter claim a small, triangular piece of ground having an area, as it is said, of about three-quarters of an acre. A suit was brought by the plaintiff in error on July 7, 1890, against the defendant in error in the circuit court for the district of Colorado, to recover the triangular parcel of land aforesaid, on the ground that the owners of the Excelsior claim had the superior title thereto by reason of their older location, and that they had been wrongfully ousted from the possession thereof by the defendant in error. On the trial in the circuit court it appeared from an admission made by counsel for the plaintiff that after the Excelsior claim was located the requisite amount of development work under section 2324 of the Revised Statutes of the United States (to wit, $100

[29] Part of the opinion is omitted.

worth of work per year, the claim having been located after May 10, 1872) was done during each of the years 1882 and 1883, that no work was done on the claim during the year 1884, but that the owners re-entered and resumed development work in 1885. When this admission was made, the circuit court charged, in substance, that the failure of the owners of the Excelsior claim to do any development work thereon during the year 1884 made the Black Queen location good as to all of the lands within its side lines and end lines, including the triangular piece heretofore mentioned, notwithstanding the fact that the owners of the Excelsior claim had originally had the superior title to the triangle in question by virtue of their older location. The theory of the circuit court seems to have been that, as the owners of the Black Queen continued in possession and at work on their claim during and after the year 1884, while operations on the Excelsior claim were suspended, and that as the two claims conflicted and overlapped in the manner before indicated, the failure of the owners of the excelsior claim to do any work during the year 1884 was an abandonment of their superior right to the space where the claims overlapped, and that as to such territory the title of the Black Queen became paramount without any affirmative action on the part of its owners, from and after January 1, 1885, and that the relative status was not altered when the Excelsior claimants resumed work during that year. The soundness of that view is challenged by the plaintiff in error, and the action of the circuit court in enforcing it in its charge is the error that we have to review.

In Belk v. Meagher, 104 U. S. 279, 283, it was held, after much consideration, that a mining location, when perfected according to the statutes of the United States and local laws and regulations, "is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent," and that there is nothing in the law under which such property is acquired "which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for the protection of any other grant from the United States." It was furthermore held in that case that a failure to do the requisite amount of annual development work on a claim under section 2324 of the Revised Statutes of the United States simply renders the claim subject to relocation by third parties, after the lapse of the year, and not before, and that such right of relocation is itself lost, and the original owner is restored to all of his rights, if he enters without force, and resumes work, before a relocation is perfected by any third party.

It should be further observed that the laws of the state of Colorado contain provisions relative to the relocation in whole or in part of abandoned lodes, and also as to the making and filing of amended location certificates under certain circumstances. These

several provisions of the Colorado statutes (Mills' Ann. St.) are as follows:

"Sec. 3162. The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new, or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property."

"Sec. 3160. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate subject to the provisions of this act. * * *"

In view of the rights that are thus acquired under the laws of the United States by the owner of a mining claim who has made a valid location, and in view of the foregoing provisions of the Colorado statutes, we are constrained to hold that the owners of the Black Queen did not acquire a superior right to the triangular parcel of land which is the subject of controversy, merely because the owners of the Excelsior claim failed to do the requisite amount of development work during the year 1884, they having resumed work in the year 1885 prior to the alleged ouster. We are unable to see upon what principle the failure to do such work operated to extinguish the title of the owners of the Excelsior claim, and to transfer it to the owners of the Black Queen. In the early days of mining, before the adoption of any laws on the subject of mining locations, there may have been such a thing as a title to a mining claim that was so entirely dependent upon possession that it ceased to exist when actual possession of the claim ceased; but at the present time the title to a well-located mining claim is not of that precarious character, for the reason that it is not exclusively dependent upon possession, but rests upon a statutory grant. As was said in Belk v. Meagher, supra, actual possession is no more necessary to protect the title to a mining claim than it is to protect the title to property acquired under any other grant from the United States. The necessary conclusion seems to be that neither the failure of the owner to occupy or to work his claim during a given year will operate to divest him of his title, and to confer it upon another. A failure to work a claim to the extent required by the statute simply entitles a third party to relocate it in the mode pointed out by existing laws, and, as the statutes of Colorado prescribe the mode in which third

parties may divest the title of the original owner by a relocation, if the statutes in that respect are not pursued, the status of all persons remains unaltered, barring the possible effect of limitations or laches; and if at any time the original owner re-enters, and resumes work, the right of relocation is then lost. * * *

For the error in the charge first above indicated the judgment of the circuit court is hereby reversed, and the cause is remanded, with directions to award a new trial.

BROWN v. GURNEY.

SMALL v. BROWN.

BROWN v. SMALL.

1906. Supreme Court of the United States.
201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. 509.

In error to the Supreme Court of the State of Colorado to review a judgment which, reversing the judgments of the District Court of Teller County, in that State, held that the south end of a lode mining claim reverted to the public domain and became subject to relocation when the claimant elected to retain the north end of the the claim, after patent for the entire claim had been refused and the Land Department had decided a contest with a placer claimant against the contention of a known vein in the placer conflict. *Affirmed.*

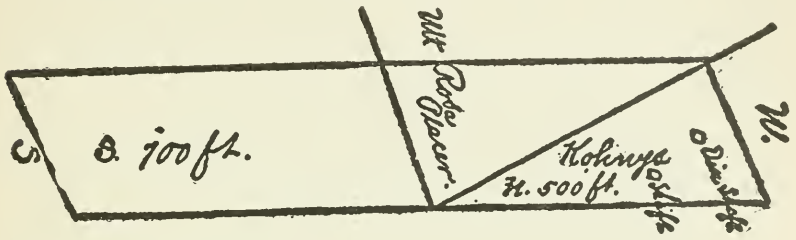
Statement by Mr. Chief Justice Fuller:

Brown applied for patent on a mining claim, known as the Scorpion, and Gurney adversed this application as the owner and claimant of the Hobson's Choice, as did Small, also, as the owner and claimant of the P. G. claim. Thereafter each brought suit in support of his adverse claim in the district court of Teller county, Colorado. The cases were tried together on an agreed statement of facts. This showed that the Scorpion, Hobson's Choice, and P. G. locations covered substantially the same tract of ground, and were all made in compliance with law, with the exception repeated in connection with each of said locations: *"Provided, however,* that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain."

It appeared that prior to May 28, 1895, a mining lode location called the Kohnyo was owned by the Cripple Creek Mining Company, which claim was divided into two non-contiguous tracts by the Mt. Rosa placer claim. The north end of the Kohnyo, comprising 500 feet of the claim, was where the discovery of mineral was made,

and it also contained a discovery shaft and the other workings and improvements of the claim. The south end being 700 feet in length, did not show mineral, and was without development work of any kind.

The following diagram illustrates the situation:



The local land office permitted the claimant of the Kohnyo to enter the two tracts as one claim, but the Department ultimately refused to issue a patent for such tracts, basing the refusal upon the ground that two portions of a lode mining claim, separated by a patented placer, could not be included within one patent. The land office gave the applicant, however, the privilege to apply for a patent upon either of the segregated tracts, and directed that, in default of an election or appeal by the claimant within sixty days from the date of the order, the entry of that portion of the claim lying south of the Mt. Rosa claim should be canceled without further notice. This decision was rendered May 28, 1895, and no appeal was taken from it; but the claimant of the Kohnyo instituted proceedings against the claimant of the Mt. Rosa placer, the purpose of which was to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer claim which conflicted with the Kohnyo location. These proceedings were prosecuted before the Land Department, with the result that on May 7, 1898, a decision was rendered against the Kohnyo claimant's contention of a known vein in the placer conflict.

June 14, 1898, the claimant of the Kohnyo filed in the land office a written instrument, dated June 10, by which it elected to retain and patent the north end of the Kohnyo claim, and in which it also waived any right to further question or review the decision of the Secretary of the Interior of May 7, 1898, affirming the decision of May 28, 1895.

July 15, 1898, the Commissioner of the General Land Office canceled the entry of the Kohnyo claim as to that portion south of the Mt. Rosa placer.

May 13, 1898, Brown located this 700 feet as the Scorpion lode claim. June 23, 1898, Gurney located the same premises as the Hobson's Choice lode claim, and July 16, 1898, Small located the same

ground as the P. G. lode claim. July 15 and 16, 1898, the claimant of the Scorpion filed amended and second amended certificates.

On these facts, judgment was rendered for defendant in each case, from which plaintiff's appealed to the supreme court of the state. That court reversed the judgment in *Gurney* v. *Brown,* and entered judgment that Gurney recover the premises included in the Hobson's Choice location, and for costs; and reversed the judgment in *Small* v. *Brown,* and entered judgment "that neither party has established any right to the premises in controversy," and for costs. The opinion is reported in 32 Colo. 472, 77 Pac. 357.

Mr. Chief Justice FULLER delivered the opinion of the court:[30]

The question in these cases, which was intended to be, and was passed upon, is when, in respect of the three locations, did the premises in controversy become subject to location? * * *

We think the stipulation and exhibits attached containing the various proceedings before the Commissioner of the General Land Office and the Secretary of the Interior establish the validity of the Kohnyo location. According to that record, the Kohnyo claim had passed to final entry; this entry had been recognized by the Commissioner of the General Land Office and the Secretary; the question litigated in the Land Department for something like three years, as to the knowledge of the placer applicant at the time of his application for patent of the existence of the Kohnyo vein in the placer ground, had been decided adversely to the Kohnyo claim; the Kohnyo claimant had thereupon accepted this decision, acquiesced therein, and availed himself of the privilege extended by the Commissioner's decision of May 28, 1895, and elected to retain the northerly tract of the Kohnyo claim, which amounted to a relinquishment of the southerly tract, and the entry as to that tract was thereafter formally canceled.

It may be added also that in adverse proceedings each party is practically a plaintiff and must show his title. *Jackson* v. *Roby,* 109 U. S. 440, 27 L. ed. 990, 3 Sup. Ct. Rep. 301; *Perego* v. *Dodge,* 163 U. S. 160, 167, 41 L. ed. 113, 118, 16 Sup. Ct. Rep. 971. By the act of Congress of March 3, 1881 (21 Stat. at L. 505, chap. 140, U. S. Comp. Stat. 1901, p. 1431), it was provided that if, in an adverse suit, "title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict." Under that act it is held that before the applicant for a patent can have judgment, he must prove his claim of title to the ground. The object of the statute was, as we said in *Perego* v. *Dodge, supra,* to provide, in the case of a total failure of proof of title, for an adjudication "that neither party was entitled to the property, so that the applicant could not go forward with the proceedings in the land office simply because the adverse claimant

[30] Part of the opinion is omitted.

had failed to make out his case, if he had also failed." 2 Lindley, Mines, § 763, and cases cited.

Of course it is essential that at the date of a location the ground located on should be part of the public domain, and in the present case the specific question affirmatively raised was whether the ground in controversy was a part of the public domain at the time of the respective contested locations.

It seems to us that when the Scorpion locator attempted to make that location he conceded the validity of the Kohnyo location and the segregation by that location from the public domain of the southerly portion of that claim, but assumed that the decision of the Secretary of May 7, 1898, operated to restore that tract to the public domain as of that date, since he relocated it on May 13, and on the following 15th of July filed an amended location. But the filing of the latter certificate did not cure the defect arising from the fact that the discovery shaft of the Scorpion was upon ground covered by the Kohnyo's claim, and the filing of the amended certificate could not perfect the Scorpion location in view of the previous location of the Hobson's Choice, which created intervening rights in favor of a third person.

The stipulation of facts was evidently prepared in respect of the inquiry concerning the date at which the ground in controversy reverted to and became a part of the public domain, and that embraced the question whether that resulted from the decision of the Secretary of May 7, 1898; or from the filing by the Kohnyo claimant of its election to retain the northerly tract and relinquish the other, June 14, 1898; or upon the formal cancelation of the entry, July 15, 1898.

Nevertheless, it is further contended that the proceedings in the Land Department between May 28, 1895, and May 7, 1898, did not suspend the operation of the decision of the Commissioner of May 28, 1895, and since by that order the Kohnyo's applicant was required to make its election within sixty days from that date, as to which end of the claim it would retain and patent, in default of which election the entry of the southerly portion became canceled, and the Kohnyo's claimant did not make such election until June, 1898, that the entry became canceled as to the ground in controversy at the expiration of sixty days from May 28, 1895, and thereupon the tract reverted to the public domain. The Land Department ruled otherwise. It treated the order of May 28, 1895, as suspended during the intermediate period, while the proceedings as to the knowledge of the placer claimant of the existence of the Kohnyo lode were pending. Manifestly because, if it was known by the placer applicant at the time of application for the patent that the Kohnyo vein extended through the placer ground, then the vein did not pass by the patent, and the Kohnyo's claimant might be entitled to patent both ends of its claims, embracing the vein and a strip through the placer location.

And when on July 15, 1898, the Department canceled the Kohnyo entry as to the tract in controversy, it was declared that: "In view

of the fact that no motion for a review of the departmental decision of May 7, 1898, affirming the decision of this office of May 28, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final, and it now devolves upon this office to execute the same."

The election, then, by the Kohnyo claimant, filed in the land office June 14, 1898, was an abandonment of the south 700 feet of the Kohnyo claim, which took effect *eo instanti.* Lindley, Mines, §§ 642–644; *Derry* v. *Ross,* 5 Colo. 295, 300. This was voluntarily done, and took effect notwithstanding the receiver's receipt had not been formally canceled. The order of cancelation of July 15 simply recorded a pre-existing fact, and did not change the effect of the previous abandonment. By reason of that abandonment, the southerly tract, for the first time, reverted to and became a part of the public domain. And as the Hobson's Choice was the first location of the ground made after such abandonment, it follows that it was valid, and that its owner was entitled to a decision in its favor.

We again state the dates of the respective locations. The Scorpion was located May 13, 1898. The Hobson's Choice was located June 23, 1898. The location of the P. G. was July 16. Thus it is seen that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice was located when the premises had reverted to the public domain; and that the location of the P. G. was after that date.

We have accepted the rulings of the Land Department that the Kohnyo location covered the southerly as well as the northerly end of that claim. Such was the decision of May 28, 1895, and that of the Secretary of the Interior of May 7, 1898, and the formal cancelation of July 15, 1898. In this separate distinct proceeding counsel cannot challenge these rulings. The attack is collateral and cannot be entertained. *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *St. Louis Smelting Co.* v. *Kemp,* 104 U. S. 636, 26 L. ed. 875. True, those decisions refer to instances where the patent had issued, but the principle of freedom from collateral attack is equally applicable where final entry has been made. The final certificate issued by the receiver after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent. We are advised in argument that the patent was issued, but it is objected that though such may be the fact, it is not so stated in the facts agreed.

The cancelation of the entry of the 700 feet did not rest on any defect in the original location. On the contrary, the Land Department held the proceedings sufficient to entitle the Kohnyo's claimant to proceed to patent for this particular tract if he should so elect. It was only when the Kohnyo claimant abandoned that tract by making

his election that he waived his right to patent it, and permitted the receiver's receipt to be canceled to that extent.

That cancelation did not itself operate to restore the southerly tract to the public domain, which had already taken place by the action of the Kohnyo claimant in compliance with the judgment of the Land Department.

We concur in the conclusions of the Supreme Court of Colorado, and the judgments are affirmed.

FARRELL v. LOCKHART.

1908. SUPREME COURT OF THE UNITED STATES.
210 U. S. 142, 28 Sup. Ct. 681.

IN error to the Supreme Court of the State of Utah to review a judgment which reversed a judgment of the District Court for Summit County, in that state, in favor of defendant in a suit in support of an adverse mining claim. Reversed.

See same case below, 31 Utah, 155, 86 Pac. 1077.

The facts are stated in the opinion.

Mr. Justice WHITE delivered the opinion of the court:

In the month of February, 1905, James Farrell, plaintiff in error, as owner of the Cliff lode mining claim, situated in the Uintah mining district, Summit county, Utah, made application in the United States land office at Salt Lake City for a patent, and published the notice required by law. The defendant in error, as the administrator of the estate of John G. Rhodin, filed an adverse claim based upon the location by Rhodin of the ground as the Divide lode mining claim. Thereafter, pursuant to Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, this action was brought in a court of the state of Utah by the administrator of Rhodin, in support of said adverse claim.

In the complaint filed by the administrator the right of Rhodin to the Divide was asserted to have been initiated by a location duly made on January 2, 1903. Farrell in his answer asserted a paramount right by reason of his ownership of the Cliff claim, averring that it had been initiated by a location made on August 1, 1901, seventeen months prior to the location of the Divide by Rhodin. To the affirmative matter pleaded in the answer of Farrell a general denial was interposed, and it was also averred as follows: Plaintiff "alleges that at the time and date of the attempted location of the said Cliff patented mining claim the ground therein contained was not any part of the open and unclaimed mineral land of the United States, but, on the contrary, the whole thereof, including the point and place of discovery of said alleged Cliff mining claim, was then embraced and included and contained in a valid and subsisting mining claim, called the South Mountain, then and there the property and in the posses-

sion of the predecessors of this plaintiff's intestate; and for the reason that the discovery of said alleged Cliff mining claim was not placed upon unoccupied and unclaimed land of the United States, the alleged location based thereon became absolutely void."

The case was tried by the court, and it was specifically found that the Cliff, the Divide, and the South Mountain Claims, as located, covered substantially the same ground, and that the place of discovery of the Cliff was within the boundaries of the alleged South Mountain mining claim. It was further specifically found by the court that, upon the trial of the action, "plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial, and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode mining claim) tending to show that, during the month of August, 1900, the ground in controversy herein was located by W. I. Snyder and Thomas Roscamp, respectively, citizens of the United States, under the name of the South Mountain lode mining claim. That a discovery of a vein was made and notice of location posted, and the boundaries of said claim marked so that the same could readily be traced, and that said notice was in due form, and was duly recorded in the office of the county recorder of Summit county, state of Utah. That no work was ever done upon said South Mountain claim, and that said South Mountain claim lapsed and became forfeited for want of work done thereon, on December 31, 1901. That no adverse claim was filed on behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim. That on or about the 13th day of October, 1902, said Snyder and Roscamp made a deed purporting to convey said alleged South Mountain lode mining claim to said John G. Rhodin."

When it decided the case, the court found that Farrell initiated his ownership of the Cliff claim on August 1, 1901, and performed all the acts required by law in addition to the annual labor required by statute, and that Rhodin initiated on January 2, 1903, his Divide claim. The court decided in favor of the defendant Farrell, and entered a decree adjudging that he was the owner, in possession of the premises in controversy, and entitled to the possession, except as against the paramount title of the United States. The court treated the proof offered on behalf of the plaintiff as to the location of the South Mountain claim for the same ground embraced in the Cliff, made a year prior to the location of the latter claim, as immaterial and irrelevant. Plaintiff duly excepted and appealed to the supreme court of the state. The court, in disposing of the appeal, considered solely what it termed the "decisive question" presented by the record, *viz.*, "whether the appellant, as owner of the Divide claim, who, as such, adversed the application for patent, is in position to show and assert that, at the time of the location of the Cliff claim, the ground located was covered by the South Mountain, a then valid and sub-

sisting claim; that the discovery point of the Cliff was within the boundaries of the South Mountain; and that, therefore, the locator of the Cliff did not discover a vein or lode on, or make a valid location of, unappropriated and unoccupied mineral lands of the United States, and because thereof his location is and was void, not only against the locators of the South Mountain, but all the world." In deciding this question the court deemed that it was called upon to consider and apply the ruling in Lavagnino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716. Doing so it was recognized that the reasoning in the opinion in that case was broad enough to maintain where, on an adverse claim, the first or senior locator did not appear to oppose the application for a patent made by a second locator, whose rights in the same ground had been initiated prior to the forfeiture of the senior location, for failure to perform the annual labor required by the statute, a third locator could not be heard to complain that the second locator had initiated his claim upon mining ground which was not at the time open to location. While thus conceding, the count considered that the reasoning in question ought to be restricted, because not to do so would cause Lavagnino v. Uhlig to be in conflict with cases decided prior to the decision in that case, and, moreover, would establish a rule in conflict with the practice which had long prevailed in the mining districts, and would therefore create great confusion and uncertainty in respect of mining claims, and unsettle rights of property of great value. The court did not at all doubt that Lavagnino v. Uhlig had been correctly decided in view of the issues in that case; but, for the reasons which we have just stated, it held that the ruling in Lavagnino v. Uhlig must be considered as narrowed, so as to apply only to a case where the second location did not embrace the discovery point of the first, but was a mere overlap. Thus applying the ruling in Lavagnino v. Uhlig, the court held that, as the location by Farrell of the Cliff claim was made upon substantially the same ground embraced by the South Mountain, and the statutory period for the forfeiture of the South Mountain claim had not expired, the Cliff claim was not located on ground subject to location, and was void; that, as the Divide had been located or relocated after the lapsing of the South Mountain claim, the Divide claim was located on land subject to be appropriated, and was therefore paramount to the second or Farrell location. The judgment of the trial court was therefore reversed and a decree was made in favor of the administrator of Rhodin. 31 Utah 155, 86 Pac. 1077. Farrell thereupon sued out this writ of error.

In the argument at bar our attention has been directed to several decisions of the highest courts in some of the mining states or in territories of the United States where mining prevails,—Nash v. McNamara (Nev.) 93 Pac. 405, and cases cited,—which, in considering the reasoning of Lavagnino v. Uhlig, also attributed to that reasoning, broadly construed, the serious and unfavorable conse-

quences on rights of property suggested by the court below in its opinion. It may not be doubted, unless the reasoning of the Lavagnino Case is to be restricted or qualified, that the grounds upon which the court below rested its conclusions were erroneous. Not doubting at all the correctness of the decision in the Lavagnino Case, especially in view of the issue as to long possession and the operation of the bar of the statute of the state of Utah, which was applied by the court below in that case, and whose judgment was affirmed, we do not pause to particularly re-examine the reasoning expressed in the opinion in Lavagnino v. Uhlig as an original proposition. We say this, because, whatever may be the inherent cogency of that reasoning, in view of the experience of the courts referred to concerning the practice which it was declared had prevailed, in reliance upon what was deemed to be the result of previous decisions of this court, and the effect on vested rights which it was said would arise from a change of such practice, and taking into view the prior decisions referred to, especially Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, as also the more recent case of Brown v. Gurney, 201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. Rep. 509, we think the opinion in the Lavagnino Case should be qualified so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that, at the time such prior location was made, the ground embraced therein was covered by a valid and subsisting mining claim. It is to be observed that this qualification but permits a third locator to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. It does not, therefore, include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if, at the time of such second location, there had been an actual abandonment of the original senior location. We say this because—taking into view Belk v. Meagher, Lavagnino v. Uhlig, and Brown v. Gurney—we are of the opinion, and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator.

In Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101, summing up as to the character of the right which is granted by the United States to a mining locator, after observing that no written instrument is necessary to create the right, and that it may be forfeited by the failure of the locator to do the necessary amount of work, it was said (p. 450) :

"(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

"An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. Snell v. Levitt, 110 N. Y. 595, 1 L. R. A. 414, 18 N. E. 370, and cases cited at p. 603 of opinion of Earl, J.; White v. Manhattan R. Co. 139 N. Y. 19, 34 N. E. 887. If the locator remained in possession and failed to do the work provided for by statute, his interest would terminate, and it appears to be equally plain that, if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the statute would terminate under such circumstances."

It remains only to test the correctness of the conclusions of the court below in the light of the principles just announced. Now, it was found by the trial court that the evidence offered tended to show that the South Mountain lode claim was located in August, 1900, *and that no work was ever done on said claim,* and that it became forfeited for want of the annual labor required by the statute on December 31, 1901. Farrell made his location in August, 1901, a year after the South Mountain was located and five months before the expiration of the period when a statutory forfeiture of the South Mountain would have resulted. The offer of proof, therefore, made by the administrator of Rhodin, to show that the South Mountain was a valid and subsisting location when Farrell made the location of the Cliff, tended to show that during the year that had intervened between the location of the South Mountain and the location by Farrell of the Cliff, no work of any character whatever was done by the locators of the South Mountain, and that this was also true from the time the Cliff was located to the expiration of the period when a statutory forfeiture would have been occasioned. As all rights of the locators of the South Mountain were, in any aspect, at an end by their failure to adverse, and as the Cliff was prior in time to the Divide, and therefore the burden of proof was on the Divide to establish that the Cliff location was not a valid one, we think that the burden would not have been sustained by the proof offered. To the contrary, we are of opinion that the proof which was so offered on behalf of the Divide tended, when unexplained, to show that the location of the South Mountain was not made in good faith, and that the claim had actually been abandoned when Farrell made his location. The supreme court of Utah should therefore have remanded the cause, so that it might be determined whether or not the South Mountain had been abandoned by the locators of that claim when Farrell made his location; and error was therefore committed in en-

tering judgment in favor of Lockhart, the administrator of Rhodin, decreeing to him possession of the ground in controversy.

The judgment of the Supreme Court of Utah must therefore be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.[31]

BRAMLETT v. FLICK.

(See ante, p. 228, for a report of the case.)

STREET ET AL. v. DELTA MINING CO.

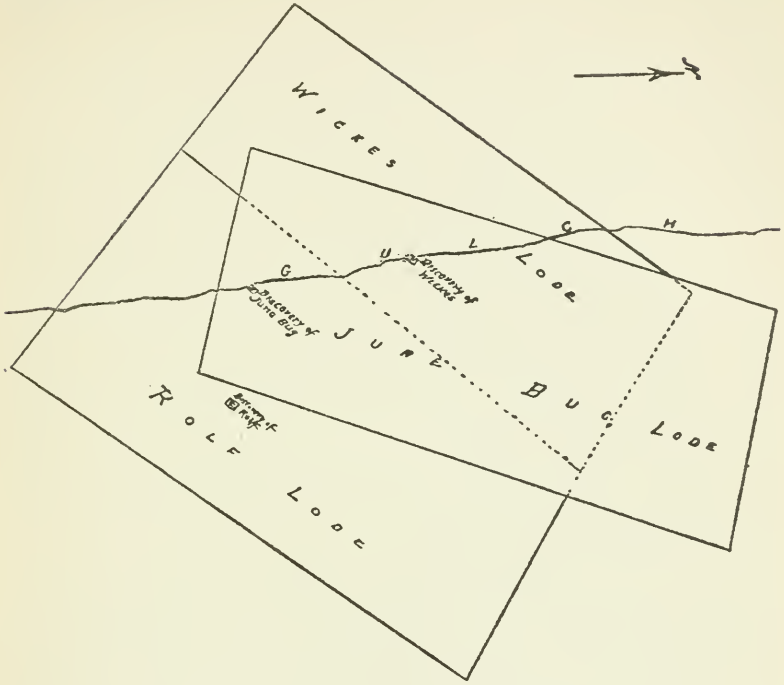
1910. SUPREME COURT OF MONTANA. 42 Mont. 371, 112 Pac. 701.

BRANTLY, C. J.[32]—This action was brought by appellants in aid of an adverse claim filed by them in the United States land office at Helena, against an application for patent by respondent to mining ground situated in Colorado unorganized mining district of Jefferson county. The respondent applied for patent to a contiguous group of six locations, designated as the Wickes, Mammoth, Covelite, Songbird, Ruby, and Daisy lodes. The adverse claim is based on a location designated as the June Bug. The latter was located on June 4, 1902. It is so situated with reference to the respondent's locations that it conflicts with all of them. * * * At the trial, the main contention made by respondent was that the June Bug location was void ab initio, because the discovery upon which it was made was within the boundaries of another location, then valid and subsisting, designated as the Rolf. This latter location was made by Huer on October 24, 1901. Most of the area covered by it is now covered by the Covelite, Ruby, and Daisy, and also by the June Bug. The discovery of the latter was within the exterior boundaries of the Rolf. No representation work was done upon this claim in 1902, or afterwards. The subjoined plat shows the relative situation of the Wickes, Rolf, and June Bug at the time the location of the last was made. Upon the evidence adduced, the court found in favor of the respondent and directed judgment to be entered accordingly. From it, and an order denying a new trial, plaintiffs have appealed. Many questions are argued in the briefs of counsel, but the only ones which it is necessary to decide are, whether the evidence is sufficient to justify the findings as to the validity of the Rolf location, and whether

[31] For a criticism of this case, see an article on "The Doctrine of Farrell v. Lockhart and Its Relation to Other Rules Applicable to the Location of Mining Claims" in 11 Columbia Law Review 593, 723.

[32] Parts of the opinion are omitted.

the court erred in its conclusion that the June Bug location was void ab initio. * * *



The court found specially that on June 4, 1902, the Rolf was a valid, subsisting location, and that Huer had not then abandoned it nor expressed or evinced any intention to do so. The question, whether the June Bug location was void in its inception, because the discovery upon which it was based was within the exterior boundaries of the Rolf, turns upon the proper answer to the inquiry, Did the subsequent abandonment or forfeiture of the latter inure to the benefit of the former? Appellants contend that it did and rely with confidence upon the decision of this court in the case of Helena Gold & Iron Co. v. Baggaley, 34 Mont. 465, 87 Pac. 455, in which, it is said, this court adopted the rule announced in the case of Lavagnino v. Uhlig, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

In the Baggaley Case, the court was considering the question whether the posting of an initial location notice effected an absolute withdrawal from exploration of the whole area within a circle described by swinging about the point of discovery as a center, the longest distance claimed from the point of discovery, over any part of which the completed location might be laid during the time al-

lowed by the statute for its completion. After quoting, from the opinion in Lavagnino v. Uhlig, the conclusion of the Supreme Court, to the effect that the senior locator may abandon or forfeit his rights under his location, and cause them in effect to inure to the benefit of the junior locator, this court said: "If this be the correct view of the law as to the effect of the forfeiture of an older claim which is overlapped by a junior one—and we deem it conclusive—for a much stronger reason must the failure of the claimant to complete his location after posting his preliminary notice inure to the benefit of a junior locator, whose claim is in conflict with such other claim, when the inchoate right acquired by the discovery and the posting of the notice never became fixed by a completion of the location." The conclusion was reached that none of the area surrounding the point of discovery, where the notice is posted, is absolutely withdrawn from exploration, but that discoveries and locations made therein by others pending the completion of the senior location are valid, in so far as they do not conflict with the senior location when completed. It was held that the failure of the discoverer of the Wisconsin claim (the senior location) to fulfill the conditions subsequent, by a completion of his location, did not cause the area covered by it, which was in conflict with the Success claim (the junior location), to revert to the public domain, but that it inured to the benefit of the latter, the location of which had been perfected.

The rule, as broadly stated in the Lavignino Case, was deemed controlling, even though it abrogated the rule theretofore declared in Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, and subsequent cases, because it is the special prerogative of the Supreme Court of the United States to construe federal statutes. While not strictly in point, because the controversy in that case grew out of conflicting locations which had been completed and thereafter forfeited, yet in principle the rule was deemed to include cases like the Baggaley Case, where the prior locator, after initiating his location, had failed to complete it during the time prescribed by the statute, and the junior locator had completed his location. And this is the correct view; for if the forfeiture or abandonment of a location already completed inures to the benefit of a subsequent location of the same ground, made prior to the forfeiture or abandonment, for a much stronger reason, as we said, should the failure of the prior locator to complete his location inure to the benefit of a junior locator of the same ground, who has actually complied with the requirements of the statute.

Upon further consideration of the situation presented in the Baggaley Case, we think the correct result was reached, even though the rule of the Lavignino Case should have been held wrong or inapplicable. To obtain the exclusive possession of any portion of the public domain, there must be a location, completed in conformity with the requirements of the federal statutes providing the mode for

acquiring title to mineral lands, and also the state statutes supplemental thereto and not inconsistent therewith, by making a discovery, posting the preliminary notice, marking the boundaries, doing the preliminary development work within the prescribed time, and making the record of a declaratory statement under oath, containing the recitals required to be made therein. It was said in Belk v. Meagher, supra: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has, in law, abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. * * * Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the Acts of Congress and the local laws and regulations."

The right to make a location is purely statutory. But for the statute, no exclusive right could be acquired; and the extent of the right, both as to the area withdrawn by the location and the character of the title acquired by it, depending, as it does, upon the fulfillment of conditions subsequent, must be measured by the provisions of the statute. If this is so, the posting of the preliminary notice certainly cannot for any length of time establish an exclusive right to a greater area than does the completed location, first, because the statute does not so provide, and, second, because a rule which would permit a prospector by posting his notice of intention to locate—which intention he is not bound to carry out—to bar other prospectors from exploring the ground within the area over which the claim may be floated, is manifestly in direct violation of the spirit of the statute. As was pointed out in the case of Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, and Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, the time allowed under the statute to mark definitely the boundaries of the location, is intended to give the discoverer of a lode, who has posted his notice, time for exploration, so that he may know how to lay his claim. The result is that if he completes his location within the statutory period, it relates to the date of the notice; but it can have no other result. It is true that in swinging his claim he may conflict with junior locators, but this cannot destroy their rights, except so far as the conflict extends. The right acquired by posting the notice is merely a preference privilege of

making a location which, when completed, will result in the appropriation of the area covered by it, to the exclusion of any junior location with which it conflicts. This we held in the Baggaley Case.[33]

[33] "The principle is therefore as firmly established as before that a location is void which is made upon ground covered at the time by a prior, valid, and subsisting location. Swanson v. Kettler (Idaho) 105 Pac. 1059.

"What constitutes a valid subsisting location within that principle, or, to state it more definitely, at what stage in the location proceedings the ground becomes segregated from the public domain, so as to invalidate a junior conflicting location from the beginning, is a question upon which there is not a uniformity of decision. In Colorado it is held that a notice properly made and posted upon a valid discovery constitutes an appropriation of the territory therein specified, so that, during the period allowed for performing the other acts required to designate the location no one can initiate a conflicting location which would be rendered valid by the mere failure of the first locator to perform the other necessary acts within the time prescribed by law. Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; Sierra Blanca Min. & Reduction Co. v. Winchell, 35 Colo. 13, 83 Pac. 628. In Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113, it was held that a location notice, claiming 1,500 feet on 'this mineral-bearing lode, vein or deposit,' was to be limited to an equal number of feet on the course of the lode or vein in each direction from the discovery point, and to that extent it was sufficient as a notice of discovery and location, and that during the period prescribed by statute for more completely designating the location the locators were entitled to such possession as would enable them to make the necessary excavations and prepare the proper certificate for record. The suit was one brought by the prior locator against others who, after the posting of the prior location notice, and within the period for completing the location, entered upon the ground, removed the prior notice, posted at the same point a notice of their own location, and maintained possession by threats of violence to the prior locator, thereby preventing him from sinking the requisite discovery shaft during the statutory period, though he had caused the boundaries of his claim to be secretly marked, and a location certificate to be recorded. The court said that as against the defendants the plaintiffs were entitled to be reinstated in the possession of their claim, and 'they could not be deprived of their inchoate rights by the tortious acts of others; nor could the intruders or trespassers initiate any rights which would defeat those of the prior discoverers.'

"The rule adopted in Nevada is that where the prior locator posts the requisite notice, and properly marks the boundaries of the claim within the statutory period, the ground becomes segregated from the public domain from the date of posting the notice, so that during the statutory period for perfecting the location the area embraced in the claim will not be open to location by others, or until after a failure to do the other work required to be done within such period. Nash v. McNamara, supra [30 Nev. 114]. In Montana the mere posting of a location notice, under which the locator might, within the statutory period for completing a location, swing his claim in any direction, is not sufficient to withdraw absolutely from the public domain the extent of territory claimed by the notice to have been located. In so deciding the court referred to the case of Lavagnino v. Uhlig, supra, as authority for the conclusion, and upon the reasoning of the opinion we think it is to be understood that the Montana court would hold that the area embraced within a mining claim does not become appropriated ground so as to invalidate a junior location until the senior location is completed by performing all the necessary location acts.

"In the case at bar it appears that the very place at which the senior lo-

But, however this may be, the rule as stated in the Lavignino Case has been entirely discredited by subsequent decisions of the Supreme Court of the United States, notably in Brown v. Gurney, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717, and in Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162, and the rule declared in Belk v. Meagher, supra, reaffirmed. * * *

The court found that at the time the location of the June Bug was made, the Rolf was a valid, subsisting claim; and since the discovery of the June Bug was within the limits of the ground already appropriated under the Rolf location, the conclusion by the district court that the June Bug location was void ab initio was clearly correct. The result is that the judgment and order of the district court must be affirmed.

Affirmed.

cators posted their notice was attempted to be appropriated by the junior locators, for their notice was posted at the same place, and they adopted or claimed the same point of discovery, and it is clear that the junior locators understood perfectly what ground was intended to be located under the prior location, and the boundaries thereof were definitely marked. The junior locators also sunk their shaft in such close proximity to the old discovery shaft, as well as the discovery shaft of the new location, that they must have known, and indeed the evidence shows that they did know, that it was within the limits of the ground claimed under the senior notice. That the posting of the senior location notice, based at the time upon a valid discovery, entitled the locators to such possession during the statutory period as would enable them to complete the location by performing the necessary acts is clear, and they might have maintained a suit to recover possession if excluded therefrom.

"But whether that right of possession, even with the boundaries of the location marked, causes a segregation of the territory from the public domain so that it may not be legally located by others during the statutory period aforesaid is a question that need not be decided. A right to public lands cannot be acquired by trespass, and an entry upon the prior possession of another is a trespass tending to breaches of the peace, and should not be encouraged. It is unnecessary to decide whether a discovery and posting of notice elsewhere upon the claim than the place where plaintiffs did post their notice and claim discovery would have constituted a trespass such as to make ineffective their effort to initiate a relocation. We do not think it possible that two competing location notices posted at identically the same place, covering and claiming the same point of discovery, can both be valid during the same period of time. One must give way to the other. The prior notice, if sufficient in form and based on a valid discovery, necessarily has precedence, and entitles the discoverer and locator to the sole benefit of the discovery at that point during the period for completing his location, unless he abandons it in the meantime. During such period the same discovery is not subject to appropriation by another for the purpose of initiating a right by location. The act of plaintiffs and their then associate in posting their notice at the place where they found the notice of Hunter and Woodruff was clearly a trespass upon the possession and rights of the latter, and quite as ineffectual to give them any right as it would have been if they had, in addition to posting their notice, destroyed or removed the prior notice." Potter, C. J., in Bergquist v. West Virginia-Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673, 683–684.

SWANSON v. SEARS AND KETTLER.

1912. Supreme Court of the United States.
— U. S. —, 32 Sup. Ct. 455.

In error to the Supreme Court of the State of Idaho to review a judgment which affirmed a judgment of the District Court of Blaine County, in that state, in favor of defendant in a suit over the right of possession of a mining claim. Affirmed.

See same case below, 17 Idaho, 321, 105 Pac. 1059; on rehearing, 17 Idaho, 339, 105 Pac. 1065.

The facts are stated in the opinion.

Mr. Justice Holmes delivered the opinion of the court:

The defendant in error Kettler applied for a patent for a mining claim. The plaintiff in error filed an adverse claim under Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, and then brought this complaint to establish his right of possession to the area in dispute. The facts are these: In 1881 the defendant's claim, then called Emma No. 2, was located, running north and south. In 1889 the plaintiff's claim, Independence No. 2, was located, running east and west, its westerly end overlapping the southerly end of Emma No. 2, and the discovery being within the overlapping part. Kettler, who then had Emma No. 2, failed, because of the illness of her daughter, to do the assessment work upon it for 1903, and, supposing that to be the only way to hold the ground, relocated it on January 1, 1904, as Malta No. 1, since which time she has done the required annual work. The only question is whether, on the failure of the defendant, as stated, for 1903, the plaintiff's location attached, or whether it was wholly void. The state courts gave judgment for the defendant (17 Idaho, 322, 105 Pac. 1059), and the plaintiff brought the case to this court.

The argument for the plaintiff is a vain attempt to reopen what has been established by the decisions. A location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482. This doctrine was not qualified in its proper meaning by Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370, for that case attributed effect to the overlapping location only for the purpose of securing extralateral rights on the dip of a vein the apex of which was within the second and outside of the first,—rights consistent with all those acquired by the first location. See Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 342, 49 L. ed. 501, 505, 25 Sup. Ct. Rep. 266. The principle of Belk v.

Meagher was reaffirmed (171 U. S. 78, 79, 43 L. ed. 82, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370), as it was again in Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 226, 227, 48 L. ed. 944, 949, 950, 24 Sup. Ct. Rep. 632, and in Brown v. Gurney, 201 U. S. 184, 193, 50 L. ed. 717, 722, 26 Sup. Ct. Rep. 509. It is true that there is reasoning to the contrary in Lavagnino v. Uhlig, 198 U. S. 453, 49 L. ed. 1123, 25 Sup. Ct. Rep. 716, but in Farrell v. Lockhart, 210 U. S. 142, 146, 147, 52 L. ed. 994, 996, 997, 16 L. R. A. (N. S.) 162, 28 Sup. Ct. Rep. 681, that language was qualified and the older precedents recognized as in full force. We deem it unnecessary to consider the distinctions attempted by the plaintiff between location and relocation, voidable and void claims, etc., as the very foundation of his right, the offer and permission of the United States under Rev. Stat. § 2322, U. S. Comp. Stat. 1901, p. 1425, was wanting when he did the acts intended to erect it. His entry was a trespass, his claim was void, and the defendant's forfeiture did him no good.

There was some attempt before us to recede from the concession made below, that the defendant had a right to relocate under Rev. Stat. § 2324, U. S. Comp. 1901, p. 1426. We do not see how it could help the plaintiff if the proposition were incorrect, or any sufficient reason for listening to the argument in this case.

Judgment affirmed.[33a]

BEALS v. CONE ET AL.

1900. SUPREME COURT OF COLORADO. 27 Colo. 473, 62 Pac. 948.

On Petition for Rehearing.

PER CURIAM.[34] * * * On the subject of annual labor, the court, by instruction No. 24, directed the jury as follows:

"Upon this point the court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and, the plaintiff claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon is on the plaintiff; and unless he has shown you, by a fair preponderance of the evidence, that the work was not done, you are to determine that question in favor of the defendants."

The objection urged to this instruction is that it cast a burden upon the appellant [the plaintiff] which he was not required to assume. The evidence tended to establish that a valid location of the premises in dispute had been made by appellees. This location was prior to the only one under which appellant can base any claim. The act of con-

[33a] See note 31, ante.

[34] Part only of the opinion on rehearing is given.

gress (section 2324, Rev. St.) provides that a failure to perform the necessary annual work shall render a claim open to relocation, provided the original locators have not resumed work upon the claim after failure and before relocation. The fair construction of this provision is that, as between the locator and the general government, the failure to do the annual assessment work does not result in a forfeiture. In other words, it is not necessary to perform the annual labor, except to protect the rights of the locator against parties seeking to initiate title to the same premises. As against such subsequent location, a prima facie case is made on the part of the original locator by showing a valid location. Hammer v. Milling Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964. To otherwise express our views, it might be said that after a valid location the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned. Renshaw v. Switzer, 6 Mont. 464, 13 Pac. 127, 15 Morr. Min. R. 345. It is the location by the new claimant, and not the mere lapse of time, which determines the right of the original locator. Little Gunnell Gold-Min. Co. v. Kimber, 1 Morr. Min. R. 536. So that a party seeking to initiate a claim to mining premises already legally located must prove that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location. In so far, then, as the rights of appellant depended upon the failure of appellees to perform the assessment work for 1897, it was incumbent upon him to establish this fact by a fair preponderance of the evidence, or, as the court stated, the burden of proof was upon him to show that the work for 1897 was not in fact performed. Hall v. Kearny, 18 Colo. 505, 33 Pac. 373; Johnson v. Young, 18 Colo. 625, 34 Pac. 173; Hammer v. Milling Co., supra.

The petition for rehearing [after affirmance of judgment for defendants] is denied. Petition denied.

Section 3.—Abandonment.

McCANN ET AL. v. McMILLAN ET AL.

1900. SUPREME COURT OF CALIFORNIA. 129 Cal. 350, 62 Pac. 31.

ACTION by J. C. McCann and others against J. C. McMillan and C. H. Barkley. From a judgment for plaintiffs, and from an order denying a new trial, defendant Barkley appeals. Affirmed.

PER CURIAM.[34a]—* * * Prior to January 1, 1896, H. B. Stevens and Eugenia D. Porter located certain mining claims, covering

[34a] Parts of the opinion are omitted.

the same ground now claimed by plaintiffs, under locations made by themselves on January 1, 1897, the validity of which is the ultimate question here involved. No assessment work was performed by the prior locators during the year 1896 on any of the claims. On December 28, 1896, said Stevens and Porter sold and conveyed their said claims to the defendant McMillan. In December 30, 1896, McMillan and one C. E. Calm went upon said claims, and, as claimed by defendants, abandoned them, and afterwards, upon the same day and the next, relocated them for and in the name of defendant Barkley. Plaintiffs made their alleged locations on the morning of January 1, 1897, assuming that the ground was then open to location.

Plaintiffs' title is controverted by appellant on each of two principal grounds, which will be noticed in their order:

1. That the ground in controversy was not open to location by the plaintiffs, because of the locations made for defendant Barkley on December 30, 1896: That the locations made prior to 1896, and which were conveyed by Stevens and Porter to McMillan on December 28, 1896, were at that time valid locations, is not questioned, and, but for the alleged abandonment of them by McMillan on December 30th, would have continued to be valid until midnight of December 31st, when the ground would become forfeited and vacant because no assessment work was done for the year 1896. The court found that the ground was not vacant at the time the Barkley locations were made, but was vacant on January 1, 1897, when plaintiffs made their locations, and therefore found, in effect, that there was no abandonment of the claims by McMillan on December 30th, but that he forfeited them by failing to do the assessment work on them, which failure left them vacant on January 1, 1897. Appellant contends that this finding is not justified by the evidence. Mr. McMillan had never seen these claims until December 30th. He bought them in Los Angeles on the 28th, and paid $100 for them. But McMillan testified that Mr. Calm was interested with him; that: "We were going to take them up to sell them to some other party. I refer to the claims in the deed from Porter and Stevens. Mr. Calm was interested with me in the purchase, and furnished some of the money. I was to stand my half of the expenses. I paid Stevens and Porter one hundred dollars. Mr. Calm paid me fifty dollars." The next day McMillan and Calm went to Daggett, and on the 30th went to the mines. McMillan testified that he was disappointed in the looks of the Dauntless, and thought, as a poor man, he could not afford to do his pro rata of assessment work, and expressed his opinion of the claim to Mr. Calm; that on the 30th of December he abandoned all interest in those three claims which he had under the deed. He further testified as follows: "On the 30th of December, when I abandoned those claims, I just said right there that I didn't want anything to do with them. I relocated them on the suggestion of Mr. Calm, but not for myself. There was, perhaps, ten minutes time in-

tervening between the time that I abandoned the claims and when we relocated them. * * * I abandoned all three claims the same day, the 30th. Those claims were located in the name of C. H. Barkley. When I gave up the claims, Mr. Calm said, 'Let us take them up for Mr. Barkley.' That is how we came to relocate them for Mr. Barkley. * * * I had not gone off the ground from the time I abandoned the claims until I relocated them. * * * I knew I could not hold the claims after the 31st unless I did some assessment work. Mr. Calm and myself did not go to the claims with the intention of locating them for some one else. I went there with the intention of locating them for myself." Mr. Calm also testified that he was disappointed and "didn't want any of it"; that he suggested that they locate the claims for Barkley, a friend of his who lived in New York, who had requested him to make some locations for him; that McMillan said "he didn't care who took it up." We think the finding that there was no abandonment is justified by the evidence. "Abandonment," as was said in Myers v. Spooner, 55 Cal. 260, "is a question of intention, and of this intention the jury were to judge in view of all the facts and circumstances of the case. It is true, as stated in the brief of counsel for appellants, that Leathe testified at the trial that there was no intention by him or his co-locators to abandon the claims. But his testimony to that effect was not conclusive." They knew when they purchased the claims that the assessment work for 1896 had not been done, and that their title would expire with the expiration of the year. They intended, as was explicitly stated, to relocate for themselves; but to wait until January 1st would expose the claims to location by others who had an even chance with them. They could not relocate before in any one's name without an abandonment, and to say to each other that they abandoned, and within 10 minutes, and without leaving the ground, locate them in the name of a person in New York, and thus burden an absent friend with mining claims which they assert were not, to them, worth doing the assessment work upon, is at least improbable. But we find at the conclusion of Mr. Calm's testimony the statement: "When I went on the ground on the 22d of January I did not look for tools. We had men on the ground at that time, and, if I had seen tools, they might have been theirs. I did not notice whether there were any tools there that did not belong to us or our men." Who the witness meant by "we" or "us" is not stated. It nowhere appears that Barkley was at any time informed of the location having been made, or that he gave any directions or authority to have any work done. McMillan, by his answer, disclaimed all right, title, or interest in said claims or either of them; but he testified that he was there in January and April, 1897, and did work on the Mars in April of that year; that the Dauntless and Minerva also had work done upon them in 1897,—and added, "I was there in possession of those claims;" that work was done in January and February; and that he was there

in possession, doing the work, when the injunction was served. McMillan further testified that he was on those claims on December 31st, the day after the alleged abandonment; that "There was no way of getting in there, except on horseback, and I went to see if I could find a good place for a wagon road;" and that he was there on January 16th, also. Barkley's deposition was not taken, nor was there any evidence that he was ever informed that these mining claims were located in his name, or that work was being done for him, or that Calm or McMillan were his agents. Barkley's answer was verified by McMillan, but even that he did not do as agent, but as one of the defendants in an action in which he disclaimed all interest. We have gone into this matter thus fully because of the direct testimony of McMillan and Calm to the alleged abandonment. It was for the trial court to determine the fact, and we think the circumstances justify the conclusion that there was no abandonment. * * *

Our conclusion is that the findings are justified by the evidence, and that there are no errors which would justify a reversal of the judgment. The judgment and order are affirmed.[35]

CONN ET AL. v. OBERTO.

1904. SUPREME COURT OF COLORADO. 32 Colo. 313, 76 Pac. 369.

ACTION by Peter Oberto against John E. Conn and C. A. Smith. From a judgment for plaintiff, defendants appeal. Affirmed.

STEELE, J.—On May 16, 1900, Alfred Smith filed in the county clerk and recorder's office of the county of San Miguel his location certificate stating that on May 15, 1900, he duly discovered and located the Jupiter lode. Smith sold a tract of 150 by 100 feet within the boundaries of the claim, reserving mineral rights, and the defendants' through intermediate conveyances, became the owners of the portion sold by Smith, and at the time of the bringing of suit were in possession thereof. Smith also sold his interest in the Jupiter claim, and prior to September 11, 1901, H. M. Hogg, Joe Oberto, and James Shain were the owners of the location, their interests being one-half, one-fourth, and one-fourth, respectively. While the property stood in the names of Hogg, Joe Oberto, and Shain, Peter Oberto was given permission by Hogg and Joe Oberto to relocate the claim. On September 11, 1901, Peter Oberto located the Hattie lode, using the discovery shaft of the Jupiter and adopting the Jupiter

[35] So "Such a thing as a conditional abandonment cannot be recognized. Where the owner allows strangers to hold a claim under color of title, standing by and intending to resume work only in case its development shows pay, his action amounts to abandonment. Trevaskis v. Peard, 111 Cal. 599."—Morrison's Mining Rights, 14 Ed., 108.

stakes. On October 31, 1901, he commenced this action against the defendants, and among other things alleged that they were wrongfully and unlawfully withholding a portion of the Hattie claim from him. The answer denies the allegations of the complaint, and by way of cross-complaint the defendants alleged that they, by virtue of certain deeds of conveyance, became and then were the owners and in actual possession of that portion of the claim in dispute. The replication alleges that Alfred Smith, the locator of the Jupiter, made no discovery of mineral in place within the boundaries of the claim; and, further, that the claim was abandoned by the owners thereof prior to the location of the Hattie. The verdict was in favor of the plaintiff, and the defendants appealed.

Mr. Hogg testified in part as follows: "I do not remember just when, but I know that some time prior to the 11th of September there was some talk of doing considerable work on the claim, and I didn't care to bother with it any more, and I told Oberto that I wouldn't have anything more to do with it. Some days after that he and his brother, Pete, came to my office. At that time Joe Oberto and myself owned all the property, so far as the records appear, and so far as I know; and he says he didn't care to have anything more to do with it, and he wanted to know if his brother, Pete, might locate it. Shain, I remember, also had a quarter interest at that time, and I said, so far as I was concerned, I had no objection, and Pete was told to go ahead; and I saw Shain afterwards, and he said he did not care to have anything to do with it. I know that about the latter part of August or the first of September we had abandoned the property." Exceptions were taken to the giving of certain instructions and the refusal to give others, but the appellants rely mainly upon the propositions: First, that there was no abandonment of the Jupiter claim at the time of the location of the Hattie; second, that, they being in possession of a portion of the Jupiter claim under a color of right, no valid right could be initiated by Oberto; and, third, that under section 2019, Mills' Ann. St., the abandonment should have been evidenced by writing.

It was held in Derry v. Ross et al., 5 Colo. 295, and approved in the recent case of Miller v. Hamley et al. (not yet officially reported) 74 N. W. 980, that abandonment is a matter of intention, and operates instanter. When a miner gives up his claim and goes away from it without any intention of repossessing it, and regardless of what may become of it or who may appropriate it, an abandonment takes place, and the property reverts to its original status as a part of the unoccupied public domain. It is then publici juris, and open to location by the first comer. The action of Hogg and Oberto, the owners of three-fourths of the Jupiter, in granting permission to Peter Oberto to enter into possession of the Jupiter and locate the Hattie thereon, was an abandonment on their part of the Jupiter claim; but such action did not deprive Shain, the owner of the re-

maining portion, of this interest in the Jupiter. Shain, however, is not before us asserting an interest in the Jupiter, and the testimony shows that he subsequently declared to Mr. Hogg that he did not care to have anything more to do with the Jupiter claim. This statement, under the circumstances, must be regarded as an abandonment by him of his interest in the claim, and as a ratification of the act of his copartners in permitting Oberto to locate the Hattie.

The argument advanced by appellants that, as they were in possession of a portion of the claim under color of title, the territory was not open to location under the mineral laws, is not sound. The possession of the appellants under a conveyance from the original locator of the claim could not ripen into a perfect title unless the original locator secured title from the government. Theirs was only a right of possession during the time the locator, or those to whom he had sold with notice, remained in possession by virtue of the rights conferred upon locators of mining claims under the law, and their title would ripen into a perfect title whenever patent issued, but when the locator of the mining claim abandoned it all the land embraced within the original location became public land and open to entry, and the right of the grantees of the locator to occupy a portion of the land terminated. The terms "unoccupied" and "unappropriated" refer to land that is not in the possession of one who claims the right of possession by virtue of a compliance with the law, and land in the possession of one who has made a valid discovery and location is not subject to location by another until after abandonment or forfeiture. But appellants did not claim to be in possession of the land by virtue of their compliance with the mining law, but by virtue of a conveyance from one who had perhaps made a valid discovery and location, but had sold the location, and those to whom he had sold had abandoned the claim. Section 2019, Mills' Ann. St. has no application to this contract. We are of opinion, therefore, that there was an abandonment of the Jupiter claim by the owners thereof, and that the location of the Hattie was made upon unoccupied and unappropriated land.

The judgment is affirmed. Affirmed.

Section 4.—Resumption of Work.

HONAKER v. MARTIN ET AL.

1891. SUPREME COURT OF MONTANA. 11 Mont. 91, 27 Pac. 397.

ACTION to recover possession of a mining claim by C. W. Honaker against John F. Martin and another. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

BLAKE, C. J.[35a]—This action was commenced by Honaker, the respondent, to recover the possession of the Lone Star Lode mining claim. The answer alleges that "no work or improvements were done or performed upon said Lone Star mine or claim in the year 1889, and in consequence thereof said claim was forfeited, if it ever existed." The court instructed the jury that the evidence "shows that the plaintiff, Honaker, did not do the required amount of work on said claim in said year 1889, and that, therefore, said claim was open to relocation, by any proper person, on the 1st of January, 1890. * * * But to this the plaintiff replies, and says that he resumed work upon said claim after his failure to do said work, and before the time (April 25, 1890) of the location of said claim by the defendants." The jury were further instructed that there was only one question for their consideration, to-wit: "Did the plaintiff, Honaker, in good faith, honestly and in fact, resume proper work upon said claim prior to said location thereof by the defendants?" * * * In Gonu v. Russell, 3 Mont. 358, it was held that the locator of a lode mining claim "had the right to defeat the forfeiture of his interest in the property by resuming labor thereon before a location thereof had been made by another;" and that "the resumption of labor in good faith," by one who had failed to comply with the statute, supra, and perform the work thereby required, before the completion of a new location which had been commenced, nullified the acts of the second locator. Gonu posted his notice, but did not mark out his boundaries until Russell had resumed work. The case of Pharis v. Muldoon, 75 Cal. 284, 17 Pac. Rep. 70, is to the same effect, but an additional fact appears: "At one o'clock A. M. of that day (January 1, 1886) plaintiff posted his notice, but did not mark out his boundaries until January 5th. In the mean time,—that is to say, at the usual hour of commencing work of that kind,—on the 1st day of January, 1886, the defendant resumed labor on his claim; did ten dollars' worth of work on it up to the 5th of January, 1886; and afterwards, during that year, performed labor upon it to the amount of two hundred dollars more." See, also, Lacey v. Woodward, (N. M.) 25 Pac. Rep. 785; Belk v. Meagher, 3 Mont. 65, affirmed 104 U. S. 279. In the last case Chief Justice WAITE said: "As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875; and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law. His rights, after resumption, were precisely what they would have been if no default had occurred." This opinion seems to give a meaning to the amount of labor demanded by the statute, supra, and it must be "to the extent required by the law." Mr. Justice HALLETT instructed the jury in the United States circuit court for the district of Colorado,

[35a] Parts of the opinion are omitted.

in Mining Co. v. Kimber, 1 Morr. Min. Rep. 536, that a party, who fails to work his claim according to the statute, supra, has the right, before the new claimant has perfected his location, "to re-enter, and upon doing the annual work required by law, he "would become re-invested with" his "first estate." We think that the foregoing authorities establish general and consistent principles.

The case of Mining Co. v. Deferrari, 62 Cal. 160, cannot be deemed sound in its construction of the statute, supra. The question is so important in its consequences that we quote at length from the opinion of Mr. Justice McKinstry: "The court found that in the year 1880 plaintiff expended, in labor on the two claims, one hundred dollars; that in January, 1881, plaintiff resumed work upon the claims, and expended in labor twenty-four dollars. Defendants entered and located in August, 1881. As the plaintiff had resumed work upon the claims 'after failure, and before location,' his rights were not forfeited when defendants entered. Rev. St. U. S. § 2324. It is urged that the resumption of work was not such as is required by the act of congress; that, if so, one may fail to perform the work required by the act during any year, and yet keep alive his right indefinitely by doing any work during the January following. In other words, that, by such construction, while the act requires one hundred dollars' worth of work each year, a party may keep his claim good by doing one dollar's worth each year, provided he shall succeed in doing it before a relocation can be accomplished. It is not necessary to decide that an attempt to assert a continuous right may be based upon a pretense of work, so plainly a sham as that it will be disregarded. But here the work done was actual and valuable. The letter of the statute upholds the view, as to resumption of work, taken by the court below, and forfeitures and denouncements are not to be favored by basing them upon language which does not plainly and unmistakably provide for them." Of this case Mr. Morrison says: "Such a decision is only trifling with the law, and the rights of parties based on the law." Mining Rights in Colorado, (6th Ed.) 61. * * * The result of the holding in Mining Co. v. Deferrari, supra, is to defeat the real objects of the statute, supra, which are the exploration and development of mining claims. Every person who continues in the possession of such property upon the public domain of the United States, without performing annually the labor that has been specified, violates the conditions of the grant from the government. The resumption of work by the original locator, whose rights are subject to forfeiture, without the expenditure, with reasonable diligence, during the year of the sum of $100 for labor or improvements upon the mine, is an evasion of the statute, supra. If we comprehend the language of Chief Justice Waite, supra, and Mr. Justice Hallett, supra, the courts will not legalize such overt acts of omission as are stated in Mining Co. v. Defarrari, supra. The question, which is embodied in the in-

structions of the court below, was submitted without any explanation of the words "resumed work," and would have a tendency to mislead the jury. They could reasonably infer that any labor showing the intention of Honaker to reassert his claim to the property was a sufficient compliance with the law. When the testimony is compared, there can be no doubt that this was the effect.

It is shown by the evidence upon the part of Honaker that he did not represent the lode in the year 1887, and relocated it January 1, 1888; that he did not go upon the property from this date until the month of May, 1890, when the defendants were in possession; that about December 20, 1889, he made a contract with Richard Berriman to represent the same for the year 1889; that Berriman labored from December 22, 1889, until January 12, 1890, under the contract, and received from Honaker $100; that logs, slabs, and lumber of the value of $63 were conveyed to the premises, and never used; that these materials were for a shaft-house or any necessary purpose on the mine; that Berriman testified he drifted "perhaps five or six feet," and did not haul any dirt from the mine; that he cut in the woods "about half a dozen" logs, and put them in the mine; that he carried there a rope, bucket, and shovels and picks, and removed them when he quit work; that there was no windlass upon the mine; and that he did not know how much he earned in January, 1890, but there was "over fifty dollars of it." The testimony of the defendants tended to prove that no work was done for Honaker upon the property in the years 1889 and 1890; that the logs, slabs, and lumber were hauled there, and not used; that tools, buckets, and wire rope were taken to the premises by Berriman, and carried away; that there were no timbers in the mine; and that the property was examined carefully to see what labor had been done upon it, and located by the defendants, April 25, 1890. It is clear that the respondent has not acted honestly and in good faith, and that, during the years 1887, 1888, 1889, and 1890, when the lode should have been developed by the expenditure of the sum of $400 for work or improvements, there is a conflict in the testimony upon the point as to whether labor of the value of one cent has been expended thereon. When, therefore, he availed himself of the statutory privilege of resuming work to preserve his estate from forfeiture, we hold that he should have prosecuted the same with reasonable diligence, until the requirements for the annual labor and improvements had been obeyed. The tools, rope, and windlass were taken from the premises about January 12, 1890, and the logs, slabs, and lumber have not been used in any manner, although nearly two-thirds of the money which was paid by Honaker to Berriman have been therein invested. What is the fair presumption from this conduct? Can it be maintained that it is the intention of the statute, supra, that, under these circumstances, the respondent shall be adjudged to have "resumed work?" If it be insisted that the instruc-

tion by the clauses, "in good faith, honestly and in fact, resume proper work," was designed to lay down the law in accordance with these views, then the verdict is contrary thereto. It is therefore adjudged that the judgment be reversed, and the case be remanded, with directions to grant the motion for a new trial.

OSCAMP v. CRYSTAL RIVER MIN. CO.

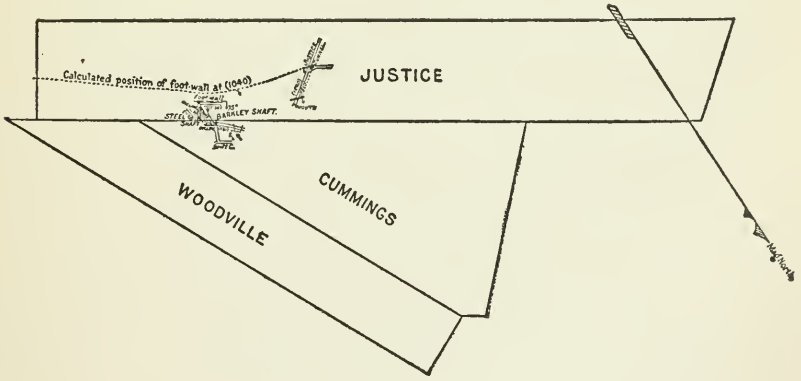
(See ante, p. 369, for a report of the case.)

JUSTICE MIN. CO. v. BARCLAY ET AL.

1897. CIRCUIT COURT, D. NEVADA. 82 Fed. 554.

THIS is a suit in equity by the Justice Mining Company against John Barclay and others to enjoin the working of a certain mine, situated in the Gold Hill mining district, in Storey county, Nev.

HAWLEY, District Judge.[36]—This is a suit in equity, brought by complainant, to enjoin the respondents from mining, extracting, or removing any quartz rock, earth, or ore from certain mining ground claimed by complainant, situate in Gold Hill mining district, Storey county, Nev. The complainant is the owner of the Justice patented ground and lode, and of the Woodville patented ground and lode, the surface boundaries of which are delineated upon the following diagram.



* * *

[36] Parts of the opinion are omitted.

The respondents, on January 1, 1896, located certain mining ground, described in the answer as follows:

"Beginning at post No. 1 on the east side line of the mining claim and premises first described in plaintiff's bill of complaint, being what was formerly known as the Justice Independent claim, U. S. survey No. 48, but now known as the Justice claim, from which post No. 7 of the Justice Independent claim bears south, 47° east, 307.1 feet distant; thence, for the first course, north, 41° west, 636.9 feet, to post No. 2, identical with post No. 6 of the U. S. survey No. 48; thence, second course, north, 49° east, 382.7 feet, to post marked No. 3; thence, third course, along the west line of said Woodville claim, south, 10° east, 743 feet, to the place of beginning,—which said last described mining claim and premises is known as and called the Hills Gold and Silver Quartz Mine."

This ground is situate within the triangle shown on the diagram between the Justice and Woodville side lines. * * *

In support of complainant's right to recover herein, it is alleged in the bill that complainant is the owner of, in possession of, and entitled to the possession of, the mining ground, claim, real estate, and premises lying between the easterly side line of the Justice patented ground and the westerly side line of the Woodville patented ground, together with all the veins of gold and silver bearing quartz rock, the apexes of which are within the surface boundaries of said claim, with the right to follow such veins or lodes to any depth; that while the respondents Charles Benham and Thomas Bell were in possession of and working on the lode within the Justice ground, as tenants of complainant, the other respondents herein, on January 1, 1896, conspired with them, and made a pretended location of a portion of said ground between the Justice and Woodville patented locations in the name of W. P. Hills, but for the use and benefit of the other respondents; that, when said location was made by W. P. Hills, the respondents Benham and Bell were in actual possession of said ground and vein as tenants of complainant, and were working the same for the purpose of complying with the laws of congress with reference to holding, possessing, and working mining claims; and that complainant had every year up to January 1, 1896, done and performed more than $100 worth of work for the purpose of holding and possessing said claim, in accordance and compliance with the provisions of the act of congress in regard thereto. The title of complainant to the particular piece of ground in controversy, independent of any rights it may have by virtue of its ownership in the Justice and Woodville patented ground, is derived from the mining location made by A. Cummings on the 19th of March, 1875, which included in its description all the ground embraced in the location of the Hills Gold and Silver Quartz Mine. This mining ground was on April 12, 1875, conveyed by deed to the Woodville Con. S. M. Company. In July, 1880, the complainant acquired title to all the

mining property of the Woodville Con. S. M. Company, including, among others, the Cummings claim. * * *

The objection urged against this location is that no evidence was offered that A. Cummings ever made the location, posted the notice, or put any stakes upon the ground, or that he or his grantees or predecessors in interest ever complied with the law requiring annual assessment work to be done upon the location; that the ground was abandoned; that, if not abandoned, it was forfeited; that it was claimed by other parties who had regularly located the ground prior to 1895, but who failed to do the assessment work in 1895; and that the ground was therefore subject to relocation on January 1, 1896, when the Hills location was made. * * *

It is a well-settled principle of law that abandonment of property is always a question of intention. It is a voluntary act. The property in question was never abandoned by complainant. It always asserted a claim to the ground. There is no evidence in the record which indicates any intention on its part to give up its right to this particular ground. Forfeiture may occur by failure to comply with some positive requirement of the statute, or of the mining rules or regulations, if the statute or rules provide that such failure shall work a forfeiture of the claim. Forfeitures, however, are not, as a general rule, favored by the law. A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the owners of the claim to have the work done or improvements made to the amount required by law. Hammer v. Milling Co., 130 U. S. 291, 301, 9 Sup. Ct. 548. Conceding, for the purpose of this opinion, that complainant had failed to do any assessment work upon the ground, and that it was, prior to January 1, 1895, subject to be relocated, still the respondents are not in a position to take any advantage of such failure on the part of the complainant to do the assessment work. The evidence is direct and positive that the object of the lease, as executed by complainant, was for the express purpose of performing enough work to hold the Cummings and the other claims lying outside of the patented lines of the Justice and Woodville. This testimony, although criticised and questioned by respondents' counsel, is undisputed. If true, it was sufficient to prevent the respondents from making any valid location in January, 1896. The assessment work by complainant in 1895, prior to the relocation of the grounds by Hills, on behalf of the respondents, and before any intervening rights by other parties had been acquired, revived its rights under the Cummings location; and the ground embraced in the Cummings claim could not therefore be considered as forfeited at the time Hills entered upon the ground, and made the location of the Hills Gold and Silver Quartz Mine.

The language of section 2324, Rev. St., is clear, plain, and explicit

upon this point. After stating the amount of work that must be annually performed on each claim, it reads as follows:

"But, where such claims are held in common, such expenditure may be made upon any one claim; and, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure, and before such location."

North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 539; Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 668, 681; Lakin v. Mining Co., 25 Fed. 337, 343; Mining Co. v. Deferrari, 62 Cal. 160, 163; Gregory v. Pershbaker, 73 Cal. 109, 119, 14 Pac. 401; Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70; Belk v. Meagher, 104 U. S. 279, 282. * * *

The fact that the "Leermo" and "Quinn" locations had been made within the surface boundaries of the Cummings prior to 1895 did not defeat complainant's title to the Cummings. If either of said locations were valid, the respondents would have no standing in court. They do not claim any rights under either of these locations. The proof is that both locations were either forfeited or abandoned. * * * The Quinn location was made in July, 1891. * * *

It is shown, however, that the complainant performed the necessary amount of work in 1895. The presence of the watchman shows, or tends to show, the actual possession of the ground by complainant, and that such possession was open and notorious.

These results, as to the acts of the complainant and its good faith with reference to its ownership of the ground embraced in the Cummings claim, taken in connection with all the circumstances under which respondents Bell and Benham took the lease, coupled, as it must be, with the further condition that while working under the lease as tenants of complainant, they discovered the ore body in dispute, lead to the conclusion that complainant has established a better right and superior title to the mining ground in question than the respondents.

But the judgment in this case need not be based solely upon this ground. The same result would probably be reached upon the theory that there is but one vein or lode within the Justice or Woodville patented lines, and that the ore extracted by the respondents was from that lode. But, be that as it may, after a careful review and consideration of all the evidence, I am clearly of opinion that the decided weight and preponderance of evidence upon the facts, shown by the developments as made in the Steele shaft and the Hills or Barclay shaft, with the different levels, tunnels, drifts, and inclines connected therewith, is to the effect that the ore body, seam, or vein disclosed in respondents' workings is a part of, and is connected in vein matter with, the Justice lode, having its apex within

the patented lines of the Justice. Let a decree be drawn in favor of complainant, in accordance with the views herein expressed.[36a]

FEE ET AL. v. DURHAM.

1903. CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

57 C. C. A. 584, 121 Fed. 488.

IN Error to the Circuit Court of the United States for the Eastern District of Arkansas.

The High Peak placer mining claim was duly located January 1, 1898, by the grantors of the defendant in error. On the 26th of December, 1899, the original locators of the claim commenced to do the assessment work for that year. Laborers, provided with suitable tools for the purpose, worked continuously during the usual working hours of each day from the 26th of December up to Saturday evening, December 30th, when they left off work, leaving their tools on the ground intending to resume work Monday morning, which they did, and thereafter prosecuted it diligently until largely more than the assessment work required by law had been done. Acting on the assumption that the original location of the claim was forfeited, and that it was open to relocation, because the full amount of the assessment work for the year 1899 had not been done before the expiration of the year, the plaintiffs in error, a few minutes past midnight on the last day of December, 1899, entered upon and relocated the claim, and afterwards brought this action of ejectment to recover possession thereof from the defendant in error. A jury trial resulted in a verdict and judgment for the defendant, and the plaintiffs sued out this writ of error. * * *

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge.[37]—The defendant's grantors were in the actual possession of the claim, actively engaged in doing the annual assessment work thereon, when the plaintiffs entered upon the claim and made their location. The entry and location, under these circumstances, was a trespass, and no rights were acquired

[36a] "There is a dictum in Klopenstine v. Hays, 20 Utah 45, 57 Pac. 712, that if work be resumed by the original owner after failure to do work for a certain year and after a valid relocation by a second party who also failed to keep up his work, that such resumption by the original owner revives the original title. It may be that in such circumstances the original owner may not be required to go through the form of a new location and record (although we would advise it) but that his title would go back by relation beyond the point of time when a valid possessory title to the same ground existed in a third party is an extremely doubtful proposition." Morrison's Mining Rights, 14 ed., 125.

[37] The statement of facts is abbreviated and parts of the dissenting opinion are omitted.

thereby. The Lebanon Mining Co. of New York v. The Consolidated Republican Mining Co., 6 Colo. 371; Weese v. Barker, 7 Colo. 178, 2 Pac. 919; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735. Inchoate rights to the public lands cannot in any case be acquired by trespass or by violence. An entry upon the prior possession of another is a trespass, and tends to provoke violence, homicides, and other crimes, and one making such an entry gains nothing by it. Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732.

The original locators must be held to have been in the actual possession of the claim at the time the plaintiffs made their location. The suspension of work Saturday night, intending to resume it Monday morning, and leaving their tools on the ground for that purpose, was not, in any sense, an abandonment of their possession for the time between Saturday night and Monday morning. In contemplation of law, their possession was as complete and actual during that time as if they had remained at work during the night and on the Lord's Day. They were not required to work during the night or on the Lord's Day in order to maintain their possession and make their assessment work continuous. Their possession was attested and protected by their work and the presence of their tools. They could not lawfully work on the Lord's Day if they had desired to do so, for the law of the state forbids labor on that day under a penalty. Sand. & H. Dig. § 1887. Resting from their work from Saturday night until Monday morning was no more an abandonment of their work or possession than the cessation of work to eat their midday meal would be.

Under the act of Congress the failure to do the required assessment work within the year does not absolutely and irrevocably render the claim subject to relocation. It has this qualification: "Provided that the original locators * * * have not resumed work after failure and before such location." Referring to this statute the Supreme Court of the United States in Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, said:

> "Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. * * * Mining claims are not open to relocation until the rights of the former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up."

The original locators in this case had not abandoned their claim, but were actually and continuously at work from the 26th of December until an early day in January, when they had done $500 worth of work. There was no suspension of the work during this time, and there was no period of time during which the plaintiffs could enter

and make a valid location. The continuity of the work and possession was not broken by the cessation of labor at night and on the Lord's Day. It must be conceded that if the original locators had "resumed work" after the clock struck 12 on Saturday night, December 31st, that the plaintiffs' location would have been invalid. We think upon the facts in this case, for all legal purposes, the original locators must be held to have been prosecuting the work for the whole of that night, and that the plaintiffs could not rightfully enter upon the claim and make a valid location between midnight and the usual hour of resuming work on Monday morning. Pharis v. Muldoon (Cal.) 17 Pac. 70; Belcher Consolidated Gold Mining Co. v. Deferrari, 62 Cal. 160.

The instructions of the court are in harmony with the views we have expressed. The judgment of the Circuit Court is affirmed.

SANBORN, Circuit Judge (dissenting).— * * *

'We find that in order to sustain the validity of the mining claim of the original locators they were required to perform work of the value of $100 on or before midnight of December 31, 1899; that they performed work of the value of only $15 prior to that time; that they were not at work upon the claim when that day expired; that the statute declared that it then became "open to relocation in the same manner as if no location had ever been made"; that between that time and 1 a. m. of January 1, 1900, the plaintiffs relocated the claim in strict conformity to the provisions of this statute; and that the original locators had not then resumed and did not resume work upon it until 7 o'clock on that morning. These facts seem to me to establish in the plaintiffs a perfect right to this mining claim under the statute which has been quoted.

It is said in the opinion of the majority that this relocation was ineffectual and void because the mining claim was in the possession of the original locators, because its relocation was a trespass, and therefore no rights in favor of the plaintiffs could be founded thereon; and Lebanon Min. Co. v. Consolidated Rep. Min. Co., 6 Colo. 371, Weese v. Barker, 7 Colo. 178, 2 Pac. 919, Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732, and Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, are cited in support of this position. These authorities, with the exception of Belk v. Meagher, which will be subsequently discussed, are not applicable to the question at issue in this case. They go no farther than to establish these two propositions: (1) That a location cannot lawfully be made upon public land in the possession of another who holds it under color of title to a prior and superior inchoate right to it (Lebanon Min. Co. v. Consolidated Rep. Min. Co., 6 Colo. 371, 379; Weese v. Barker, 7 Colo. 178, 2 Pac. 919); and (2) that a right to a mining claim or to any other title cannot be lawfully initiated by a forcible, as distinguished from a peaceable, entry (Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732). The case at bar does not fall under either of these propositions. In

the first place the original locators had no title or color of title to a superior or to any inchoate right to this claim when the plaintiffs relocated it. They, therefore, had no right which drew to them the lawful possession as against the plaintiffs, and they were not in the actual possession of it. The inchoate right of the original locators had ceased at midnight of December 31, 1899. Their possession, as against qualified locators, had also ceased, because the statute declared that the moment they had failed to do the work within the year the land was open to relocation, notwithstanding their possession, in the same manner as if no location of the same had ever been made. The only right remaining in the original locators was the right to resume before the plaintiffs relocated the land, and this was a mere floating right, subject to the earlier exercise of the right of the plaintiffs. The plaintiffs first exercised their right, and thereby secured the superior claim. In the second place, the entry of the plaintiffs was peaceable, not forcible, so that it does not fall under the rule in Atherton v. Fowler, which was made for the express purpose of avoiding violence and personal injury in the assertion of conflicting claims.

Nor does the fact that the plaintiffs relocated this claim between 12 o'clock and 1 o'clock at night militate in any way against its validity. Congress in its wisdom provided that the man who first after midnight of December 31st in each year relocated a forfeited claim should have the prior right to it when they enacted that the year within which the work should be done should commence on the 1st day of January succeeding the date of location. U. S. Comp. St. 1901, § 2324. They might have provided that this year should commence at the hour when courts generally open, at 10 o'clock in the forenoon, and then the relocations would have been made between 10 and 11 in the morning. Under the act as Congress saw fit to enact it, the custom and practice of miners has been, is, and naturally will be, to make most of their relocations between 12 and 1 at night (Lindley on Mines, § 652, p. 823), because only in this way can they be sure that the exercise of their rights will precede the exercise of similar rights by others. In this state of the law and the practice of miners it is not perceived that later relocations would be either more righteous or more secure than those made immediately after the expiration of the year fixed by the act of Congress.

It is believed that under the provisions of the act of Congress under consideration the original locators of this claim had no inchoate right to it and no possession of it when the plaintiffs relocated it; that the plaintiffs' peaceable entry for that purpose was not a trespass; that their relocation established in them a perfect right to this mine superior to that of the original locators and that these propositions are sustained by the act of Congress itself, and by the decisions of the courts, which have considered and decided the questions here presented. U. S. Comp. St. 1901, §§ 2322, 2324; Belk v.

Meagher, 104 U. S. 279, 287, 26 L. Ed. 735; Du Prat v. James, 65 Cal. 555, 557, 4 Pac. 562; Russell v. Brosseau, 65 Cal. 605, 608, 609, 4 Pac. 643; Kramer v. Settle, 1 Idaho, 485, 491, 492; Renshaw v. Switzer (Mont.) 13 Pac. 127; Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88.

Section 2322, U. S. Comp. St. 1901, under which the original locators held this claim, provided that "the locators of all mining locations * * * so long as they comply with the laws of the United States * * * shall have the exclusive right of possession and enjoyment" of their respective claims, and this provision was equivalent to a declaration that they shall not have the right to the possession and enjoyment of the claims when they cease to comply with the laws of the United States. When the plaintiffs made their relocation the original locators had ceased to comply with these laws, they had not performed the work which those laws required them to do during the year 1899 as a condition precedent to the continuance of their right, and they had no right either to the claim or to the possession of it. Section 2324 makes this conclusion clear, for it provides that upon a failure to perform this work within the year the claim shall be "open to relocation in the same manner as if no location of the same had ever been made," unless the original locators resume work before relocation is made. When the plaintiffs relocated the claim the original locators had completely failed to do the required work of the year 1899, and they had not resumed work upon this claim. They were not in the actual occupation of it. The entry of the plaintiffs upon it was peaceable, necessary to the exercise of the right given them by the statute, and it was made for the express purpose of enforcing that right. This entry, this relocation, could not have been a trespass, for a trespass is an unlawful interference with the right of another, and this relocation did not impinge upon any of the rights of the original locators or of any other parties. The only right they had was the right to resume work before the plaintiffs relocated the claim. The right to resume and the right to relocate vested in the respective parties the instant the 31st day of December passed. Congress granted the right to the land to the parties who first exercised their right. The plaintiffs exercised their right to relocate before the original locators exercised their right to resume and they thereby acquired the better right to the property. Their acts of entry and relocation did not constitute a trespass, because they violated none of the rights of the original locators, but simply asserted and exercised a right Congress had expressly granted to them. These views are not without support in repeated decisions of the courts. * * *

The act of Congress and the authorities under it seem to me to be clear and conclusive that where the work is not done within the year the right of the locator ceases. Nothing but the required work will preserve it. Neither idle tools lying upon the ground nor good

intentions can, in my opinion, be substituted for the work required, because the statute excludes them when it expressly limits the condition precedent to the performance of the work within the year. When the failure to do that work has occurred, nothing but a resumption of the work before a relocation will, in my opinion, sustain the original location. Tools upon the ground, intention to resume, resumption after relocation, are each and all alike ineffectual to re-establish the original location, because the act of Congress expressly excludes them when it declares that resumption of the work before the relocation, and that alone, can re-establish the original location.

For these reasons, in my opinion the judgment below ought to be reversed, and a new trial of this case ought to be granted.

THORNTON ET AL. v. KAUFMAN.

1910. SUPREME COURT OF MONTANA. 40 Mont. 282, 106 Pac. 361.

ACTION by W. D. Thornton, John Hopkins, and Edward Shone against Louis Kaufman. Plaintiffs had judgment, from which, and an order denying new trial, defendant appeals. Reversed.

HOLLOWAY, J.[38]—* * *

The plaintiffs rely upon a forfeiture by the defendant of his right to the disputed ground under his Little Spring location by reason of his failure to do the necessary annual work or improvement during 1897. The trial court found that defendant forfeited his right to the ground in dispute by failing to do the necessary amount of work or improvement during 1897, and that defendant did not resume work on that claim in good faith prior to plaintiff's location of the disputed ground as a part of the vigilant claim. The evidence shows without substantial dispute that during 1897 the defendant did not do more than $30 worth of work or improvement on the Little Spring claim, so that the ground was open to relocation on January 1, 1898, unless the defendant in good faith resumed work upon his claim before the ground was relocated. Section 2324, Rev. St. (U. S. Comp. St. 1901, p. 1426). By stipulation of the parties at the trial it was agreed that during the month of December, 1898, the defendant did $100 worth of work upon the Little Spring claim, and that he did a like amount every year thereafter up to the time of the trial in 1908. The only attack made upon defendant's Little Spring claim is under the plea of forfeiture above.

It would seem that the trial court must have held that the original declaratory statement of the Vigilant claim was sufficient, or that, if

[38] Part of the opinion and the concurring opinion of Smith, J., are omitted.

an adverse claim was initiated before the defendant resumed work in good faith, such initiative claim would take precedence over the prior located claim upon which the necessary annual labor had not been done. Neither the original declaratory statement of the vigilant claim which was filed in 1898, nor the first amended declaratory statement filed in 1901, complied, even substantially, with the requirements of the statute then in force. Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034. The second amended declaratory statement, which apparently meets the requirements of the law fully, was not filed until 1907. But the initiation of an adverse claim is not sufficient to prevent the original locator from resuming work and saving his claim. The only injunction laid upon him by section 2324 U. S. Rev. St., above, is that he shall resume work upon his claim in good faith before a location thereof is made by some one else. The location of a mining claim does not consist alone of discovery and posting notice of location. "The law contemplates that the location of a mining claim shall consist of a number of distinct acts which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists." Gonu v. Russell, 3 Mont. 358; McKay v. McDougall, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395. In Butte Con. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, this court said: "In order to make a valid quartz lode mining location, our Political Code (sections 3610, 3611, and 3612) * * * requires (1) the discovery of a vein or lode; (2) the posting of a notice of location at the point of discovery containing the matters designated by section 3610; (3) the marking of the boundaries on the ground, and the doing of certain development work, designated in section 3611; and (4) the filing for record of a declaratory statement containing the matters mentioned in section 3612." Since the plaintiffs did not complete their location until the filing of the second amended declaratory statement in 1907, it would seem that the court's finding that defendant forfeited his claim must be erroneous, for, before that date, the defendant had resumed work on the Little Spring claim, and had expended in work and improvements some $900 or $1,000, and this apparently in perfect good faith.

But it is suggested that in order for defendant to comply with section 2324, Rev. St. U. S., above, it was necessary for him to do the work delinquent in 1897, but with this we do not agree. The government or a subsequent locator is the only one who can complain of a failure on the part of a locator to do the necessary annual work, and the subsequent locator is not in a position to make complaint until he has completed a valid location, and, if prior to the completion of such valid subsequent location the original locator has resumed work upon his claim in good faith, his previous delinquency is not a matter of consequence. Temescal Oil Min. & D. Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010. Forfeitures are so odious to the

law that the rule is quite uniform that every reasonable doubt will be resolved in favor of the validity of the mining claim as against the assertion of a forfeiture. 27 Cyc. 600. Viewed in the light of this rule, we think the defendant showed such a resumption of work on his claim before plaintiffs' location was perfected, as saved it from the charge of being forfeited.

The judgment and order are reversed, and the cause is remanded to the district court, with direction to enter judgment for the defendant for the territory in dispute.

Reversed and remanded.[39]

[39] For a criticism of the doctrine of this case, see Costigan, Mining Law, 290–291, 318.

It has recently been held that under the Alaska statute resumption of work will not prevent a relocation. Thatcher v. Brown, 190 Fed. 708. But query?

CHAPTER VII.

SUB-SURFACE RIGHTS.

FEDERAL STATUTES.

SEC. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other. Rev. St. U. S., § 2320.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. Rev. St. U. S., § 2322.

Section 1.—Vein Essentials for Extralateral Right Purposes.

DUGGAN v. DAVEY.

(See ante, p. 25, for a report of the case.)

TABOR v. DEXLER.

(See ante, p. 40, for a report of the case.)

GRAND CENTRAL MIN. CO. v. MAMMOTH MIN. CO.

(See ante, p. 41, for a report of the case.)

GOLDEN v. MURPHY ET AL.

(See post, p. 622, for a report of the case.)

Section 2.—Intralimital Rights.

REYNOLDS AND ANOTHER v. IRON SILVER MIN. CO.

1886. SUPREME COURT OF THE UNITED STATES.
116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. 601.

MILLER, J.[1]—This is a writ of error to circuit court for the district of Colorado, which brings here for review a judgment of that court in an action to recover possession of a part of a vein or lode of mineral deposit.

The plaintiff below, the Iron Silver Mining Company, alleged that it was the owner of 193.43 acres of land, conveyed by the United States by patent to its grantors, and seeks to recover of defendants a part of the land thus patented. It is described in the petition as mining land and a mining claim. The patent under which plaintiff claims, which was introduced in evidence, purports to be for placer mines, and it takes two pages of printed matter to describe the courses, distances, and corners. As the law does not permit any one claim to cover more than 20 acres in locating placer mining claims, it is obvious that under the ruling of this court in *Smelting Co.* v. *Kemp*, 104 U. S. 636, a number of these claims, amounting at least to 10, have been consolidated into one patent, which was issued to Wells and Moyer, the patentees.

The defendants asserted a right to the vein or deposit in which they were working under lode claims called the "Crown Point" and "Pinnacle" claims, which were older than that of plaintiff. Defend-

[1] Parts of the opinion are omitted.

ants also set out another defense in the following language: "That at the time of the survey, entry, and patenting of the said Wells and Moyer placer claim, a certain lode, vein, or deposit of quartz or other rock in place, carrying carbonates of lead and silver-bearing ore, and of great value, called the 'Pinnacle Lode,' and a certain lode, vein, or deposit carrying like minerals of great value, were known and claimed to exist within the boundaries and underneath the surface of said placer claim, survey lot No. 281; and that the fact that such vein or veins were claimed to exist and did exist as aforesaid within said premises was known to the patentees of said claim at all times hereinbefore mentioned; and that in the application for patent for said placer claim the said vein or veins so known to exist were not included, and were, in the patent issued upon such application, expressly excluded therefrom. And, further, in the said patent it was expressly and in terms reserved that the premises in and by such patent conveyed might, by the proprietor of any such vein or lode of quartz or other rock in place bearing mineral or ore as aforesaid, be entered for the purpose of extracting and removing the ore from such lode, vein, or deposit, should the same, or any part thereof, be found to penetrate, intersect, pass through, or dip into the premises by such patent granted."

The case was tried by a jury, and a verdict rendered for plaintiff, under a charge from the court which required such a verdict at their hands. * * *

The conflict in principle between the instructions asked and refused and those given by the court is marked and easily discerned, and presents the only question in the case. Its primary form is presented by the fourth of the defndant's requests, namely, "that plaintiff must recover on the strength of his own title." This is the fundamental principle on which all actions of ejectment or actions to recover possession of real estate rest. Even where the plaintiff recovers on proof of priority of possession, it is because in the absence of any title in any one else this is evidence of a title in plaintiff. If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title; and that the defendant in possession can lawfully say: "Until you show *some* title, you have no right to disturb me,"—it has not been pointed out to us.

The remainder of this fourth prayer was a further statement of the same rule as applied to the case in hand: "If the vein is not conveyed to plaintiffs by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiffs cannot recover on the weakness of defendants' title." There is not in the record any pretense or claim of title in plaintiff, except that growing out of the placer patent to Wells and Moyer. If that gave no title to the vein in controversy, plaintiffs had none. There is no assertion by them of prior possession, discovery, or claim

to that vein, nor of any other right to it than that it is found beneath the surface of this placer patent. While the court refused to give this instruction, he did instruct the jury that defendants were naked trespassers, and added that "as to such intruders the plaintiff's placer title might give a right of possession and recovery." He had previously said that this would be a question of some difficulty in a case where defendants had shown some right or interest in the lode, or an intention to claim the same according to local laws and the acts of congress. If this made any difference in defendants' right as against the placer patent, then it appears to us that they did "show an intention to claim the *locus in quo* according to local laws and the acts of congress," for they were working under the Crown point and Pinnacle claims, which were legally established, and were pursuing the vein on which these claims were located. But the court held that the evidence showed that they were pursuing it when it passed out of the end lines of the claim instead of the side lines. It would seem that such possession as this ought to be sufficient to enable them to put the plaintiff upon proof of its title.

It is fair, however, to say that the court in effect affirms the doctrine that the patent for a placer mine (this patent) gives title to a vein or lode under its surface, though known to the original claimant or patentee at the time of the assertion of the claim and issue of the patent, and not disclosed to the land officers or mentioned in the patent, or in the original claim, as against one not having a superior title. The court says the evidence tends to prove that the lode in controversy was known to Wells and Moyer, grantees of the United States, at the time they made application for the placer patent under which plaintiff claims title; also that Stevens, a grantee of Wells and Moyer, and grantor of plaintiff, knew of the existence of the lode at the time the application was made for the patent, and procured the application to be made, with the intention to acquire title to the lode now in dispute. Yet, while the lode is not mentioned in the patent, the court held that for the purposes of this suit the title to it was conferred by that instrument. It appears to us that such a proposition is opposed to the policy of the acts of congress in the different rules which it applies to granting titles to placer mines, and to vein, lode, and fissure mines; to the express language of the statute; and to the reservations in the patent itself.

It is not necessary to go further than an examination of chapter 6 of the Revised Statutes concerning the public lands, to see this difference. * * *

It [Congress] made provision for three distinct classes of cases: (1) When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall state that fact, and on payment of the sum required for a vein claim, and 25 feet on each side of it, at $5 per acre and $2.50 for the remainder of the placer claim, his patent shall cover

both. (2) It enacts that where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof. (3) But in case where the applicant for the placer patent is not in possession of such lode or vein within the boundaries of his claim, but such a vein is *known to exist,* and it is not referred to or mentioned in the claim or patent, then the *application shall be construed as a conclusive declaration that the claimant of a placer mine has no right to the possession of the vein or lode claim.*

It is this latter class of cases to which the one before us belongs. It may not be easy to define the words "known to exist" in this act. Whether this knowledge must be traced to the applicant for the patent, or whether it is sufficient that it was generally known, and what kind of evidence is necessary to prove this knowledge, we need not here inquire. It is perhaps better that these questions should be decided as they arise. They do not arise here, because the court took all this kind of evidence from the jury on the ground that defendants were trespassers.

It said in the charge, not only was there evidence that the vein was known to exist when the application was made by Wells and Moyer, but that *they* knew it, and that one of the parties in interest (Stevens) knew it, and procured the application to be made for the placer patent with the intent to secure this lode. There was here no question of sufficiency or character of the testimony as to the knowledge of the existence of this vein, but the jury was told that it was all immaterial, because in any event the patent carried the lode as against the defendants. The patent itself declares that it is subject to the following conditions: (1) That it is restricted to any lodes, veins, or other mineral bearing quartz which *are not claimed or known to exist* at the date of the patent; (2) that should any such vein or lode be claimed or known to exist within the described premises at the date of the patent, the same is expressly excluded from it.

It is said that this part of the patent is void because there was no law which authorized its insertion, and because it is in conflict with the rights of the claimant of a placer mine under the acts of congress. Without deciding on the effect of the acceptance without protest of a patent with such exceptions in the granting clause, where their insertion is the voluntary act of the officers who execute the instrument, it is sufficient to say that these conditions but give expression to the intent of the statute. We are of opinion that congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the

issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land, and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as *were known* to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was *known to exist* at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent. Whether the defendant has title, or is a mere trespasser, it is certain that he is in possession, and that is a sufficient defense against one who has no title at all, and never had any.

The judgment of the circuit court is reversed, and the case remanded to that court, with instructions to set aside the verdict and grant a new trial.

WAITE, C. J., (*dissenting.*)—I am unable to agree to this judgment. The facts briefly stated are these: The mining company holds title under a patent for a placer claim. Within the boundaries of this claim, as located on the surface and extended vertically downwards, is a vein or lode. The existence of this vein or lode was known when the patent under which the mining company holds was issued, but it had not then, nor has it now, been located as a vein or lode claim. Neither Reynolds nor Morrissey has any title to or claim upon the lode within the boundaries of the placer claim. They are mere intruders, having wrongfully, and without any authority of law, worked from an adjoining claim under the surface of the placer claim of the mining company and taken possession of the mineral in the lode. Under these circumstances it seems to me the mining company has the better right. The question is not whether the company owns the lode or vein, nor whether it has the right to take mineral therefrom, but whether, as against a mere intruder, it has the better right to the possession. By the express provision of section 2333 the patent under which the company holds gives it no right to the possession of any vein or lode *claim* within the boundaries of the placer patent, but as yet no such *claim* exists. There is a lode or vein, but no one has either claimed or attempted to claim it. Quite different questions would arise if Reynolds or Morrissey were attempting to locate a lode claim within the boundaries of the placer patent upon a lode known to exist when the patent was applied for. In my opinion the charge of the court was right, and the judgment should be affirmed.

ST. LOUIS MINING & MILLING COMPANY OF MONTANA v. MONTANA MINING COMPANY.

1904. Supreme Court of the United States.
194 U. S. 235, 48 L. ed. 953, 24 Sup. Ct. 654.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Montana, enjoining the further prosecution by the owner of a lode mining claim of a horizontal tunnel from his claim into an adjoining patented lode claim, for the purpose of reaching a vein in its dip through the adjoining claim. *Affirmed.*

Statement by Mr. Justice Brewer:

This was a suit brought by the appellee (hereinafter called the Montana company) against the appellants (hereinafter called the St. Louis company) in the circuit court of the United States for the district of Montana, for an injunction restraining the further prosecution of a tunnel. The facts were agreed upon, and are substantially that the Montana company was the owner and in possession of the Nine Hour lode mining claim under a patent from the United States, on a location made under the mining acts of 1872 and acts amendatory thereof; that the St. Louis company was the owner of the St. Louis lode mining claim, holding the same under a similar title. In the St. Louis claim is a vein other than the discovery vein, having its apex within the surface limits of the St. Louis claim, but on its dip passing out of the side line of the St. Louis claim into the Nine Hour claim. The tunnel was 260 feet underground, running from the St. Louis into the Nine Hour claim and for the purpose of reaching the vein on its descent through the latter. It was run horizontally through country rock, and between the east line of the St. Louis claim and the vein above referred to will not intersect any other vein or lode. The St. Louis company did not propose to extend the tunnel beyond the point at which it would intersect the vein above referred to, and simply proposed to use this cross-cut tunnel in working and mining said vein. The circuit court, upon the facts agreed to, enjoined the further prosecution of the tunnel. That injunction was sustained by the circuit court of appeals for the ninth circuit (51 C. C. A. 530, 113 Fed. 900) from whose decision the St. Louis company has brought the case to this court.

Mr. Justice Brewer delivered the opinion of the court:

The situation and the question can be easily presented to the mind by considering the significant lines as lines of a right-angled triangle; the vein descending on its dip being the hypothenuse, the tunnel the base line, and the boundary between the two claims the side line of the triangle. The St. Louis company, being the owner of the vein, may pursue and appropriate that vein on its course downward, al-

though it extends outside the vertical side lines of its claim and beneath the surface of the Nine Hour lode claim. Such is the plain language of § 2322, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1425) which grants to locators "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

In other words, it has a right to the hypothenuse of the triangle. May it also occupy and use the base line? Is it, in pursuing and appropriating this vein, confined to work in or upon the vein, or is it at liberty to enter upon and appropriate other portions of the Nine Hour ground in order that it may more conveniently reach and work the vein which it owns? .Its contention is that the mining patent conveys title to only the surface of the ground and the veins which go with the claim, and that the balance of the underground territory is open to anyone seeking to explore for mineral, or at least may be taken possession of by one other than the owner of the claim for the purpose of conveniently working a vein which belongs to him. The question may be stated in another form: Does the patent for a lode claim take the subsurface as well as the surface, and is there any other right to disturb the subsurface than that given to the owner of a vein apexing without its surface, but descending on its dip into the subsurface, to pursue and develop that vein?

We are of opinion that the patent conveys the subsurface as well as the surface, and that, so far as this case discloses, the only limitation on the exclusive title thus conveyed is the right given to pursue a vein which on its dip enters the subsurface. By § 2319, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1424) "all valuable mineral deposits in lands belonging to the United States" are "open to exploration and purchase, and the lands in which they are found to occupation and purchase." By § 2325 (U. S. Comp. Stat. 1901, p. 1429) "a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person * * * having claimed and located a piece of land for such purposes * * * shall thereupon be entitled to a patent for the land." In a subsequent part of the same section it is provided that the applicant shall pay $5 per acre. Appellants rely upon the clause heretofore quoted from § 2322 as a limitation upon the full extent of the grant indicated by these provisions. But this limitation operates only indirectly and by virtue of the grant to another locator to pursue a vein apexing within his surface boundaries on its dip downward through some side line into the ground embraced within the patent. It withdraws from the grant made by the patent only such veins as others own and have a right to pursue. As said by Lindley (1 Lindley, Mines, 2d ed. § 71):

"In other words, under the old law he located the lode. Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex of the vein."

And in vol. 2 (§ 780):

"Prima facie, such a patent confers the right to everything found within vertical planes drawn through the surface boundaries; but these boundaries may be invaded by an outside lode locator holding the apex of a vein under a regular valid location, in the pursuit of his vein on its downward course underneath the patented surface."

See also *Calhoun Gold Min. Co.* v. *Ajax Gold Min. Co.* 182 U. S. 499, 508, 45 L. ed. 1200, 1206, 21 Sup. Ct. Rep. 885. The decisions of the courts in the mining regions are referred to in the opinion of the court of appeals in this case, from which we quote:

"This view is in accord with the trend of all the decisions to which our attention has been directed. In *Parrot Silver & Copper Co.* v. *Heinze,* 25 Mont. 139, 53 L. R. A. 491, 87 Am. St. Rep. 386, 64 Pac. 326, the supreme court of Montana held in substance that the owner of a mining claim is prima facie the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said: 'Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction when it departs beyond the vertical planes of the side lines is an expansion of the rights which would be conferred by a common-law grant.' Of similar import is *State ex rel. Anaconda Copper Min. Co.* v. *District Court,* 25 Mont. 504, 65 Pac. 1020. In *Doe* v. *Waterloo Min. Co.* 54 Fed. 935, Judge Ross said: 'Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law.' In *Consolidated Wyoming Gold Min. Co.* v. *Champion Min. Co.* 63 Fed. 540, Judge Hawley said: 'Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim."

The judgment of the Court of Appeals is affirmed.

JEFFERSON MINING CO. v. ANCHORIA LELAND MIN. & MILL. CO.

(See post, p. 533, for a report of the case.)

ROXANNA GOLD MINING & TUNNELING CO. v. CONE ET AL.

(See post, p. 543, for a report of the case.)

COLORADO CENT. CONSOLIDATED MIN. CO. v. TURCK.

1892. CIRCUIT COURT OF APPEALS. 2 C. C. A. 67, 50 Fed. 888.

IN error to the Circuit Court of the United States for the District of Colorado. Affirmed.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, DISTRICT JUDGE.[2]—* * * The instruction tendered by the defendant company in effect asked the circuit court to declare that section 2322 does not permit one who locates upon the apex of a lode or vein to follow the vein outside of his side lines and underneath the boundary lines of an adjoining proprietor if the latter holds under a senior patent. As the proposition was stated in the instruction it excluded all consideration of the question whether the Colorado Central Company had or had not first discovered and located the same vein on the dip which the owner of the Aliunde was following underneath its territory. In other words, it asserted that the right given by section 2322 to the holder of the apex to follow his vein on its dip outside of the side lines of his claim is merely a right that can be asserted against an adjoining claimant holding under a junior patent or certificate. We are of the opinion that the instruction, as asked, was properly refused. It rested upon an interpretation of the statute that cannot be sustained in view of the language employed, and, so far as we are aware, has never, as yet, been adopted. In two cases (*Milling Co.* v. *Spargo*, 16 Fed. Rep. 348, and *Amador Medean Gold Min. Co.* v. *South Spring Hill Gold Min. Co.*, 36 Fed. Rep. 668) it was held that a patent for agricultural lands, issued under the pre-emption laws of the United States, carries the right to all mines underneath the surface to which no right has attached at the time the certificate of purchase or the patent issues, and that a reservation in such patent, saving the rights of proprietors of mining veins or lodes, related solely to those proprietors whose rights had attached before the lands were purchased for agricultural purposes. We think that the same effect cannot be given to a patent for a mining claim which appears to have been given in the cases cited to patents for agricultural land. The title acquired by a patent of the former de-

[2] The statement of facts and parts of the opinion are omitted.

scription bears little resemblance to a title conferred by the latter, because it is acquired and held under the provisions of statutes differing widely both in their language and purpose. The statute conferring the right to follow a lode outside the side lines of a location, when the top or apex of the lode lies within the boundaries of the location, does not, in terms or by necessary implication, limit the exercise of that right, especially where mining claims are involved, to cases where the adjoining claims are held under junior locations or patents, and we think we would not be justified in placing such a limitation upon the right by construction. The practice of the general land office for many years also appears to have been opposed to the existence of any such limitation. * * *

Upon the whole, therefore, we find no material error in the record, and the judgment of the circuit court is accordingly affirmed.[3]

Section 3.—Extralateral Rights Under the Act of 1866.

FLAGSTAFF SILVER MINING COMPANY v. TARBET.

(See post, p. 431, for a report of the case.)

ARGONAUT MIN. CO. v. KENNEDY MIN. & MILL. CO.

1900. SUPREME COURT OF CALIFORNIA. 131 Cal. 15, 63 Pac. 148.

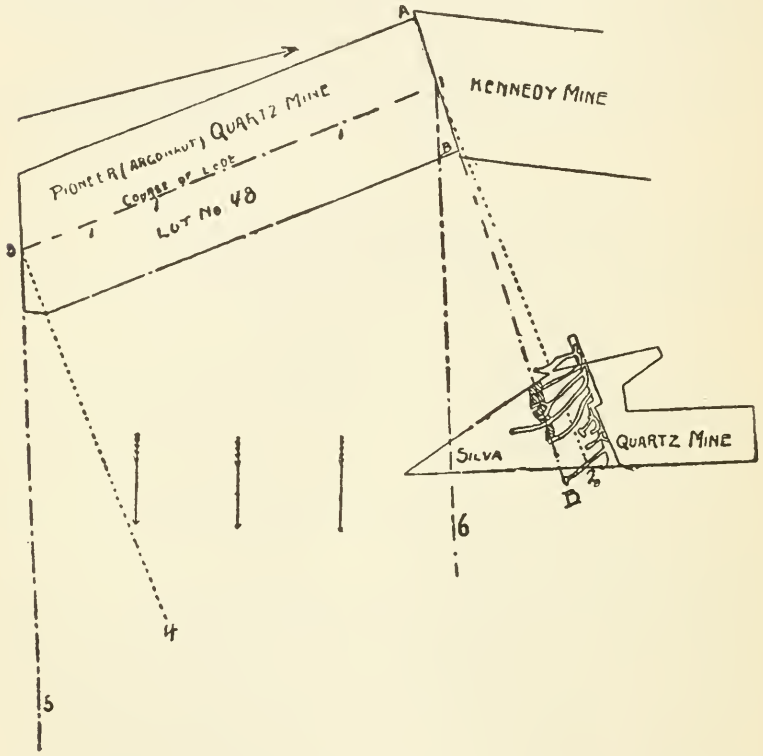
ACTION by the Argonaut Mining Company against the Kennedy Mining & Milling Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

TEMPLE, J.—This is an action for damages for the value of ore alleged to have been taken by defendant from plaintiff's mine, situate in Amador county. The defendant denies taking any ore or gold-bearing rock from plaintiff's mine, and avers that defendant is the owner of the mine from which the rock was taken. The cause was submitted in the trial court upon an agreed statement of facts, each party having the right to object to the relevancy, competency, and materiality of any part of it. Certain objections to evidence were made by the appellant, which were overruled by the court, and the

[3] Even in the case of agricultural land patents, the same rule should be applied. As Mr. Lindley points out (2 Lindley on Mines, 2 ed., § 612) all the federal laws providing for the sale and disposal of the public lands "are essentially *in pari materia*." Opposed to Amador Medean Gold Min. Co. v. South Spring Hill Gold Min. Co., 36 Fed. 668, is the decision of the trial judge in Wedekind v. Bell, 26 Nev. 395, 69 Pac. 612, which the upper court did not pass on because of a settlement pending the appeal. In the briefs of counsel as summarized in the official report is disclosed the trial court's ruling.

main argument here has been in regard to these rulings. Much of the evidence was objected to simply upon the ground of immateriality. All that I deem it necessary to say in regard to such rulings is that, admitting that the trial court erred, as I am inclined to think it did, defendant has suffered no harm. The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence.

The controversy is indicated by the following diagram:



The plaintiff owns the Pioneer quartz mine, and the defendant owns the Kennedy mine and the Silva mine. All three mines had passed to patent before the ore was taken out by defendant. The ore was taken under the Silva location, and within its exterior limits carried vertically down. It was taken from the discovery lode of the Pioneer location, which is the only lode which has its apex within that location. It enters that location near the middle point of the southern end line, and runs northerly through the location in a direction practically parallel to the side lines, through the center of the

northern end line. In fact, save that the end lines are not parallel, the location and the lode are the ideals upon which the rules and regulations of miners and the laws of congress seem to have been based.

The defendant does not assert any right to the ore in dispute by virtue of its ownership of the Kennedy mine, and nothing further need be said about it. Defendant asserts title to the ore by reason of its ownership of the Silva ground, under what counsel call the common-law right to everything beneath the surface. It admits plaintiff's ownership of the Pioneer mine, and that the lode has its apex, as stated, within its surface location, but denies that the quartz taken by it from that lode is within that location. This is asserted, as I understand the contention, upon two grounds: First, defendant contends that, because of nonparallelism of the end lines of the Pioneer, it carries no extralateral rights; and, second, if the court can as matter of law construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel will be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The dip of the lode is easterly at an angle of about 60° from the plane of horizon, and the end lines of the Pioneer diverge in that direction to the extent of about 14° 45′. The ore was taken out directly beneath the Silva surface location at depths varying from 1,400 to 2,000 feet beneath the surface. The Silva location is more than 900 feet easterly from the easterly line of the Pioneer location. The Pioneer was located, as the patent shows, under the law of 1866. The application for a patent was filed January 13, 1871. On the 23d day of February, 1872, the Pioneer entered and paid for its mine, and the patent is dated August 12, 1872. The act to promote the development of the mining resources of the United States was passed May 10, 1872. For reasons, which will appear as this opinion proceeds, I think plaintiff is entitled to all the rights which would attach to such a location under the law of 1866, and to any additional rights which inured to such locations under the act of 1872.

Among the contentions of the respondent is this: "Although the end lines were not required to be parallel under the act of 1866, yet if, by any process of reasoning, any limitation upon the extralateral right was imposed upon the locators' title by reason of the divergence of end lines, such limitation was removed by the act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course, between the end-line plane of such location as it existed." This proposition is based upon the language of the first proviso in section 3 of the law of 1872. After stating that the locators shall have certain lodes throughout their entire depth, although they may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines, it proceeds: "Provided, that their right of possession to such outside

parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid through the end lines of their location so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." Then follows another proviso, that no locator, by reason of his right to the dip of his lode, shall be authorized to enter upon the surface of a claim owned by another. These provisos grant no rights additional to those already given, nor do they purport to do so. They are both express limitations upon rights already given. The proviso does not confer ownership to all within those planes, but says, in effect, that no locator may pass beyond them. No rule of construction with which I am familiar would authorize or require a different reading of the section, especially in the face of the evident policy to strictly limit the rights of all locators as to length along the vein or lode.

We have many graphic accounts of the rush of gold hunters to California in 1849. The river banks and gulches were suddenly crowded with eager and earnest men anxious to dig for gold. There was no law by which any one could secure to himself any portion of the rich placers. In the absence of regulation, the strongest or most unscrupulous would get the lion's share. The miners, of necessity, made and enforced their own laws. Some regulations as to mining claims sprung into existence naturally, in fact necessarily. First, so far as possible, each person was given a specified portion of the ground, which he could mine. Secondly, the allotment to each was so limited that there should be no monopoly. So far as possible, all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims. And, thirdly, as a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him. These essential rules have been the basis of most of the rules and regulations of miners, and have been recognized in every mining district on the Pacific Coast, and in all attempts by legislation, territorial, state, or national, to regulate mining locations. Indeed, it may be said that the purpose of all these laws and regulations is to secure these ends.

These views are, as I think, expressed by Judge Field in the celebrated Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548. The locations there considered were made under the law of 1866, and one of the questions to be decided was whether the defendant was entitled to its allotted distance along the vein, although in its strike the vein passed beyond its exterior surface lines. There was no contention based upon diverging end lines, and there could not have been; for the ore body in dispute was within planes passing through the end lines of the Champion location, which belonged to plaintiff, and was not

within such planes passing through the end lines of any location under which defendant claimed. Defendant, on this point, simply contended that it had the oldest location, and under the law of 1866 had a right to the number of feet on the lode called for in its location, although it extended within the junior locations owned by plaintiff. It was held that defendant could not follow the lode on its strike through any line of its surface location. In reaching this conclusion the court emphasized the invariable and inexorable policy to limit the location along the course of the vein to the quantity located, and to the line of the surface location, and to permit an extension of right only on the dip.

Bearing, then, in mind that the argument was to show that under the law of 1866 the locator could not, for the purpose of securing his length of lode, pass the lines of his surface location, we may be instructed by the decision. It is first said the locations under the law of 1866 are not invalid because the end lines are not parallel. The law did not require such parallelism, and the requirement in the law of 1872 was merely directory, and no consequence attached to a deviation from the direction. "Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations as the length of the lode."

The locator was limited to his number of feet on the lode throughout its entire depth, and the court realized that the only possible mode of so limiting the right was by parallel end lines. The miners seem to have regarded a lode as something like a plank. All a locator had to do was to measure off his distance upon it, and then make a "square cut" at the end. Judge Field's idea that the planes of the end "cuts" must be parallel in order to limit the locator at all depths to his number of feet claimed upon the surface is further shown. He says: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors, and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules. Similar rules have been adopted in numerous min-

ing districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners. If, for instance, the state were to-day to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant. The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein, with its dips, angles, and variations, to any depth, although it may enter land adjoining; that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles, and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course, or "strike," as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode within which he is permitted to work, and out of which he cannot pass."

Judge Field here was endeavoring to show that the locator was limited, under the law of 1866, to the specified number of linear feet on the lode throughout its entire depth. The extent of his right could be measured by the feet on the surface. The statement that the requirement in the law of 1872, that the end lines shall be parallel, was only directory, was overruled in Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98, but that the limitation upon the line or distance on the lode continues throughout its entire depth has always been recognized. And, indeed, it seems obvious that the opposite contention could not be thought of. A proposed rule may be tested by inquiring what may be done with it. Suppose the divergence here had been 150° instead of 15°, the dip being at a small angle from the plane of the horizon; the statutory limitation upon the length which could be taken on the lode would be a farce, even were the ledge the ideal ledge of

miners. The Pioneer would soon have extended itself to the entire length of the lode.

I think the law of 1872, instead of extending the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2 provides: "Mining claims upon veins or lodes * * * heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations and laws in force at the date of their location." These words themselves, in my opinion, are sufficient to support the declaration of the court in the Eureka Case. Speaking of the limitations provided in section 3 of the act of 1872, which I have noticed, of lodes to planes through the end lines [Judge Field there said]: "The act in terms annexes these conditions to the possession, not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes, found within the surface lines." This proposition is substantially reiterated in Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98, and in many other cases, including the latest to which our attention has been called (Walrath v. Champion, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170).

It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode 1,589.94 linear feet "of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described, throughout its entire depth; * * * provided, that the right of possession to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added, as a condition, "that the grant hereby made is restricted to the land hereinbefore described as lot No. forty-eight (48), with fifteen hundred and eighty-nine and 94-100 linear feet of the Pioneer quartz vein, lode, ledge, or deposit, throughout its entire depth," etc. I think it clear that there is no attempt here to convey all within planes passing through the end line, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion that a patent to a location with end lines diverging in the direction of the strike does not convey all within those planes, but, at the most, not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extralateral rights at all. Such would be the law if the

location were under the law of 1872, and, as the patent to the Pioneer was issued after that law took effect, counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extralateral rights. Another objection is that there is no description of the segment of the lode which extends beyond the surface location, and no grant can be effectual which does not define the thing granted. Parallel end lines were not required in locations by the law of 1866, and yet extralateral rights were specifically given. The act refers to rules and regulations made by miners, but it is not said that any such rules required parallel end lines. It is claimed in argument that such was, in general, the custom of miners, but it is not even contended that there was such a custom in Amador county, and all the patents shown in this case lack such parallelism.

I think it would have been competent for congress in the law of 1872 to have required parties who had equitable rights to patents to cause such adjustments of their surface lines as would indicate and define their extralateral rights; in other words, to have made their end lines parallel before a patent would issue, on pain of losing all extralateral rights. There are no such provisions in the act of 1872, but the rights of locators under former laws are expressly confirmed to them. The presumption is very strong against forfeiture, and against such construction of any law as would work a forfeiture. The language of an act to have such effect must be very plain, or the court will, if possible, give a construction to it that would not have that effect.

It is admitted that such extralateral rights are recognized and asserted in the Eureka Case, and I think the language used by Judge Field in Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98 (the Horseshoe Case), is equally clear upon this matter: "Under the act of 1866 (14 Stat. 251), parallelism in end lines of a surface location was not required, but, where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines." This very clearly implies that a locator under the act of 1866 has such right, although his end lines are not parallel. In many other cases the same thing is implied. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Walrath v. Mining Co. (C. C.) 63 Fed. 552; Id., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

We come, then, to the other phase of the question: Can it be determined as matter of law, from the patent or the complaint, what segment of the dip, if any, the plaintiff acquired by his location or patent? It is admitted, or rather contended, by counsel on both sides that the court cannot construct end lines. If the court is to adjudge that plaintiff is entitled to follow the dip beyond his lines, it must find some mode of limiting the right along the vein, and that limita-

tion must result as matter of law from the patent, when the necessary facts are shown as to the property it attempts to convey; that is, as to the course and dip of the lode.

The contention of the parties in regard to this matter is shown upon the diagram. Of course, it is understood that plaintiff contends for all included between planes drawn through its end lines, although they diverge, and would inevitably extend his rights along the strike, while defendant contends that because of such divergence plaintiff has no extralateral rights. But each party has an alternative theory, in case its primary contention is not sustained. Plaintiff says, if planes through its end lines do not control, then planes are indicated between lines perpendicular to the general course of the lode.

Defendant's alternative is that, as the southern end line constitutes the initial line in the survey, it necessarily follows from the requirement of parallel end planes that the northern end line shall be parallel to it; that by locating and fixing the southern end line first the northern end line was thereby also definitely and finally located. These theories are shown in the diagram. 3–5 is the southern end line continued; 1–6 is a parallel line from the northern end of the lode. This shows defendant's theory. These lines would give the ore in dispute to defendant. The lines suggested by plaintiff are 1–2 and 3–4. These are at right angles to the general course of the lode, and planes descending through them would give the ore to plaintiff. The line B–B′, is the northern end line continued, and between that line and 3–5 is plaintiff's first contention, which we have considered.

I am not referred to any authorities which support the contention of appellant that the southern end line must be considered as the basis from which the surface form of the location was projected. As stated, the argument is that, having been first located, it followed, as matter of law, that the other end line must be in the same direction in order that end lines may parallel. But the location was made, surveyed, and the land paid for, and application made for the patent, before the law of 1872 was enacted. The act of 1866 did not require parallel end lines to insure extralateral rights, or at all. There was therefore no implication that the second end line should be parallel to that first established. It was not an absolute necessity, that by a naked description one end line should be described before the other. A side having been located, one sentence could have created both end lines from each end, and at right angles to the side line, in a certain direction. No such general rule, therefore, applicable to all cases could be adopted. Planes so constructed could not result as matter of law.

Planes through the lode at the end lines of the location, at right angles to the general course, would impose the required limitation upon the rights of the locator along the lode. The rule that they must be so constructed would be universally applicable; at least, theoretically. The congressional system for the sale of mineral lands is

founded upon the proposition that the course of the lode can be traced. That nature, in her infinite variety, does not always so deposit her mineral gifts, is unfortunate; but I think, in construing the law, we may have regard to the views of the lawmakers in regard to its subject, however crude and inadequate such views were. The law of 1866 is said to have been but a crystallization of the rules and customs of the miners. The first lodes worked were, I think, nearly in a uniform direction. The individual claims were short, usually 200 feet. Under such circumstances, it was not difficult to appropriate to each his number of feet on the dip at any depth. In California mines such claims were very often consolidated and disputes avoided. Often, as on the Comstock lode, the miners agreed upon a base line from which the surface form of locations were projected, or to which they were adjusted. This would result in parallel end lines.

The general practice, I think, was to have their claims bounded, so far as the lode was concerned, by parallel end lines, whatever might be the form of their surface location. In fact, they adopted the idea put forth by Judge Field in the Eureka case. Their rights on the lode were limited to planes at the limit of their right to the lode on the surface, at right angles to the general course of the lode. The Eureka Case is perhaps the only express authority for this proposition, but I do not find, as claimed by the learned counsel for the appellant, that it has been repudiated by later cases. On the contrary, these cases which imply extralateral rights when the end lines are not parallel seem to concede this rule. I am unable to understand Walrath v. Mining Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170, upon any other theory. There was liberty of surface form under the act of 1866, but the law strictly confined the right on the vein below the surface. This accords both with the Eureka Case and the Flagstaff Case, 98 U. S. 463, 25 L. Ed. 253. In the latter case it was said: "But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." But rights on the strike were limited by the surface lines of the location under both laws. Judge Field was familiar with the mining customs and laws. I have no doubt he expressed in the Eureka Case what had been and was the universal understanding and practice of miners. The rule there declared seems to me reasonable, and, in fact, the only one that can be applied to such patents issued under locations made before the law of 1872 came into existence. If, as suggested, the officers of the land office usually adjust and make the end lines of locations parallel before issuing the patent, such patents, when issued, will be conclusive evidence that such also was the location.

A case has been cited in which the end lines of the location

converge in the direction of the dip. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C.) 73 Fed. 597. It was held that the locator had extralateral rights because the conveyance would give less rather than more on the dip of the vein. This may be all right, as it seems to me, however, not because the patent carries less rather than more than would pass had the end lines been parallel, but because that which is granted is described so that it can be definitely located. Under the force of the restriction contained in section 3 of the law of 1872, the locator could not take beyond planes through his end lines. This confined him, within well-defined boundaries, to less on the dip below the surface than he had upon the surface. If this was an attempt to construe the act of 1872, the logic might be questioned. That act, as construed, does not grant extralateral rights because the end lines are parallel or converge towards the dip of the vein, but if they are parallel. The location there under consideration was made under the act of 1866, and carries extralateral rights because the extent of such rights is definitely described. At least, such was the fact, and no other reason was required. It was therefore not necessary in that case to consider the point here under debate. If this position be correct, the complaint does definitely describe the segment of the lode from which the ore was taken. The judgment is affirmed.[4]

Section 4.—Extralateral Rights Under the Act of 1872.

(a) *The Relation of Veins to End Lines and to Side Lines.*

FLAGSTAFF SILVER MIN. CO. v. TARBET.

1879. Supreme Court of the United States. 98 U. S. 463, 25 L. ed. 253.

Error to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. Justice Bradley delivered the opinion of the court.

This was an action in the nature of trespass quare clausum fregit, brought in the District Court of the Territory of Utah for the Third District, by Alexander Tarbet, and continued by his assignee, Helen Tarbet, against the Flagstaff Silver Mining Company of Utah (limited), and other persons. The action having been dismissed as to

[4] In East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266, 51 L. ed. 476, 27 Sup. Ct. 258, it was held that the requirement of parallelism of end lines made by the act of 1872 did not apply to a location under the act of 1866 which had so far advanced to patent when the act of 1872 was passed that adverse claims were excluded.

other persons, judgment was rendered for $45,000 damages upon the verdict of a jury against the company. The latter carried the case to the Supreme Court of the Territory, where the judgment was affirmed on the 3d day of June, 1878. The company thereupon sued out this writ of error.

The controversy relates to the working of a mine in Little Cottonwood Mining District in the County of Salt Lake. The defendant in error claims to own, and to have been in possession of, a mining location on the lode called the Titus Lode, the location including three claims, and extending six hundred feet westwardly from the discovery, with a width of 200 feet, and including ten feet on the east side of the discovery belonging to the South Star mine. The plaintiffs in error owned and had a patent for another mining location, called the Flagstaff mine, 100 feet in width and 2,600 feet in length, running in a northerly and southerly direction, and crossing the Titus claims near the west end thereof, and nearly at right angles therewith. In working from the Flagstaff mine the plaintiffs in error worked around subterraneously, to a point some 300 feet to the east of their location, and on the north side of the Titus mine, and within about 100 feet of the Titus location. It is for this working that the suit was brought; and the principal question is, whether the plaintiff in error had a right thus to work outside of its location on the east, and whether, in doing so, it interfered with the rights of the defendant in error.

It is conceded that both parties are working on the same lode or vein of ore. The Flagstaff discovery, to which the location of the plaintiff in error relates as its starting point, is situated nearly due west from that of the South Star and Titus, and about 550 feet therefrom. The lode crops out at the two points of discovery, but is not visible at intermediate points. These croppings, however, show that the direction or course of the apex of the vein, at or near the surface, is nearly east and west. The location of the Titus, claimed by the defendant in error, nearly corresponds with this surface course of the vein. The location of the Flagstaff, belonging to the plaintiffs in error, crosses it nearly at right angles.

The principal difficulty in the case arises from the fact that the surface is not level, but rises up a mountain in going from the Titus discovery to the Flagstaff. The dip of the vein being northeasterly, it happens that, by following a level beneath the surface, the strike of the vein runs in a northwesterly direction, or about north 50° west. In other words, if by a process of abrasion the mountain could be ground down to a plain, the strike of the vein would be northwest instead of west, as it now is on the surface; or, at least, as the evidence tended to show that it is. In that case, the location of the defendant in error would leave the vein to its

right, and the location of the plaintiff in error would not reach it until several hundred feet to the north of the Flagstaff discovery.

Evidence being given pro and con in reference to the condition and situation of the vein, both at and below the surface, and to the workings thereon by both parties, the judge charged the jury as follows:

"If you find that Alexander Tarbet, during the time mentioned in the complaint, to-wit: from January 1, 1873, to December 14, 1875 (being a period of 2 years, 11 months and 14 days), was in possession of the whole or an undivided interest of Nos. 1, 2 and 3 of the Titus mining claim, and ten feet off No. 1 of the South Star mining claim, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface, then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways: by the length of the course of the vein within the surface, and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

The court refused to give the following instructions propounded by the plaintiffs in error, to wit: "By the Act of Congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that Act takes a fee simple title to the lode, to the full extent located and claimed under said Act."

Secondly, "In the very nature of the thing, a lode or vein, in

its unworked and undeveloped stage, cannot be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram required to be filed by the applicant for a patent under the Act of 1866 was a diagram of the surface area claimed; and this diagram might be extended laterally and otherwise, as convenience in working this claim might suggest to the applicant."

These instructions and refusals to instruct indicate the general position taken by the court below, namely: that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction.

The plaintiff in error has made the following assignment of error, which indicates the position which it contends for:

"The plaintiff in error assigns for error the charge of the court and the refusal to give its requests, that is, that the Judge instructed the jury that the defendant below had shown no title or color of title to any part of the vein except so much of its length on its course as lies within the surface ground patented; and that he refused to direct the jury that by the Act of Congress it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode irrespective of the surface area, which was merely for the convenience of working the lode; that the diagram required to be filed by an applicant for a patent was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest; that the surface ground patented does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take; and, lastly, that the Flagstaff Company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location."

Both parties agree in the general rule that the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the general rule of miners' law, and the true construction of the Act of Congress. The language of the Act of 1866 (14 Stat. 251) in relation to "a vein or lode" is, "That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules," etc. The Act of 1872 (17 id. 91), is more explicit in its

terms; but the intent is undoubtedly the same, as it respects end lines and side lines, and the right to follow the dip outside of the latter. We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only 100 feet wide, that 100 feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

The location of the plaintiffs in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end of their claim, considering the direction or course of the lode at the surface.

As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See, Rockwell, pp. 56-58, and pp. 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it.

The plaintiff in error contended, and requested the court to charge, in effect, that having received a patent for 2,600 feet in length and 100 feet in breadth, commencing at the Flagstaff discovery, on the lode at the surface, it was entitled to 2,600 feet of that lode along its length, although it diverged from the location of the claim, and went off in another direction. We cannot think that this is the intent of the law. It would lead to inextricable

confusion. Other localities correctly laid upon the lode, and coming up to that of the plaintiff in error on either side, would, by such rule, be subverted and swept away. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein further than it continued substantially to correspond with it. Of what use would a location be, for any purpose of defining the rights of parties, if it could be thus made to cover a lode or vein which runs entirely away from it? Though it should happen that the locator, by sinking shafts to a considerable depth, might strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow the dip in a regular way. So far as he can work upon it, and not interfere with their right, he might probably do so; but no farther. And this consequence would follow irrespective of the priority of the locations. It would depend on the question as to what part of the vein the respective locations properly cover and appropriate.

We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the Act of Congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.

If these views are correct, the Titus claims, belonging to the defendant in error, were located along the vein or lode in question in a proper manner; and the Flagstaff claims, belonging to the plaintiff in error, were located across it, and can only give the latter a right to so much of the vein or lode as is included

between their side line. The court below took substantially this view of the subject, and ruled accordingly.

As this is really the whole controversy in the case, it is unnecessary to examine more minutely the different points of the charge, or the instructions asked for by the plaintiff in error. The question was presented in different forms, but all to the same general purport. Judgment *affirmed*.[5]

KING v. AMY & SILVERSMITH CONSOLIDATED MIN. CO.

1894. SUPREME COURT OF THE UNITED STATES. 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. 510.

APPEAL from, and in error to, the supreme court of the state of Montana.

This was a suit by Silas F. King against the Amy & Silversmith Consolidated Mining Company for a partition of the Non-Consolidated mining claim, of which the parties are tenants in common, or, in case that proved impracticable, for a sale and division of the proceeds, and also for an accounting in respect to certain ores alleged to have been wrongfully taken by defendant from the claim, by following the dip of the vein through the side line of the Amy claim, which adjoined the Non-Consolidated on the south. The apex of the vein passed out of the north side of the Amy into the Non-Consolidated, and the trial court held that defendant had a right to follow the dip through the vertical plane of that side line up to the point where it intersected a vertical plane drawn at right angles across the vein at the point where it passed out of the Amy claim. On appeal to the state supreme court, this judgment was reversed; that court holding that defendant's right to follow the dip was bounded by a vertical plane parallel with the end lines of the Amy location, and drawn through the apex of the vein at the point where it passed out of the side line of that location. See 24 Pac. 200.

[5] In Argentine Min. Co. v. Terrible M. Co. 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. 1356, 1359, Field, J., for the court said:

"The instruction asked assumes that the longest sides of its claims were their side lines. Such would undoubtedly be the case if the locations of the claim were along the course or strike of the lode. The statute undoubtedly contemplates that the location of a lode or vein claim shall be along the course of the lode or vein. * * *

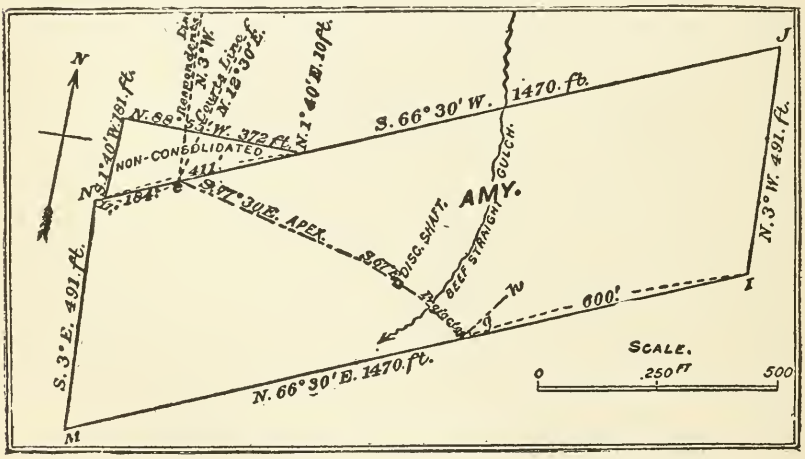
"When, therefore, a mining claim crosses the course of the lode or vein instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface. Such is the purport of the decision in Mining Co. v. Tarbet, 98 U. S. 463."

To review this decision, plaintiff took an appeal, and also sued out a writ of error from this court.

Mr. Justice FIELD delivered the opinion of the court.

The plaintiff and the defendant are owners, as tenants in common, of certain mining property in Silver Bow county, state of Montana, known as the "Non-Consolidated Lode Mining Claim." The plaintiff owns three-fourths of the claim, and the defendant one-fourth. The defendant is, besides, the sole owner of the mining claim situated in the same county and state, known as the "Amy Lode Mining Claim." Both claims are located and patented under the mining laws of the United States contained in sections 2320 and 2322 of the Revised Statutes. The Amy claim was first located, and has the earlier patent.

The relative positions of these two claims are seen on the diagram in the record, which shows the course of the vein in the Amy claim upon which its location was made, and the boundaries of the two claims, with the length and direction of each. The description of the two claims can be understood only by reference to the diagram, as each line is given. A copy of the diagram is here produced, as without it the description will be unintelligible to the reader.



The Amy claim has a surface length of 1,470 feet, and its side lines are parallel. The end lines are each 491 feet, and they are also parallel. The surface location forms a parallelogram of 1,470 feet running easterly and westerly, by 491 feet running northerly and southerly.

The Non-Consolidated claim lies adjoining the northwest corner of the Amy claim. Its surface shape is that of a triangle, the longest side of which joins the northerly side of the Amy claim, and, com-

mencing 17 feet from the northwest corner of the latter, extends easterly 411 feet in length. Its northerly side line, commencing (on the northerly line of the Amy) at the point where the first line terminates, runs in a northwesterly direction 372 feet to the point where it meets the westerly line of the lode, and extends southwesterly from this point 181 feet to the place of beginning.

The vein of the Amy claim, on its course or strike, passes through its northerly side line, as marked on the diagram, into the Non-Consolidated ground. Its apex crosses that line 184 feet easterly from the west end line of that claim, and does not again enter the Amy claim. The apex of the vein enters the south side of the Amy claim at a point within 600 feet westerly from the southeast corner of the Amy, and the dip of the vein is to the north.

We have, in this description of the claims in controversy, followed in a large degree that given in the brief of the defendant's counsel, for the subject does not admit of greater clearness of statement.

The plaintiff has brought this action for a partition of the Non-Consolidated claim with the defendant, according to the respective rights of the parties, if that be possible, but, if the property cannot be thus partitioned advantageously, then for a sale of the premises, and a division of the proceeds among the owners, in conformity with such rights.

As stated above, the vein of the Amy, of which the apex lies within the surface lines of the claim, in its course passes through the northerly side line, and enters the Non-Consolidated claim; and it is alleged that the vein has been there worked by the owners of that claim, and valuable ore taken therefrom. The plaintiff, therefore, prays, in addition to a partition or sale of the Non-Consolidated claim, for an accounting for his share, as tenant in common of an undivided three-fourths of that claim, of the ores taken from the underground workings of the vein of the Amy after it had passed into that claim, if any there were.

The defendant admits his cotenancy in the Non-Consolidated claim with the plaintiff, but denies the taking of any ore from the vein of the Amy after it had passed into its ground.

The first question for determination is whether the Amy retained any right to the vein, the apex of which was within its surface lines, after it had passed through its northerly side line, or rather through the vertical plane running down that line. If the Amy retained its right to that vein after it had entered the ground of the Non-Consolidated claim, it belonged to the defendant as sole owner of the Amy; and, as such owner, he could not be called on to account to the plaintiff for any portion of the ores taken from it. If, on the other hand, the Amy did not retain its right to that portion of the vein after it had passed into the Non-Consolidated claim, it became a part of that claim; and the proceeds of the ore there taken from it

would, with other proceeds of the Non-Consolidated claim, be the subject of an accounting between the plaintiff and the defendant, the owners, as tenants in common of that claim. The answer to the question must be found in the construction given to section 2322 of the Revised Statutes, which took effect December 1, 1873. That section is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surfaces included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

The preceding section (2320) prescribes the extent to which mining claims upon veins or lodes of quartz, or other rock in place, bearing gold, silver, or other valuable deposits, on lands of the United States, may be taken up after May 10, 1872. It allows a claim to be located to the extent of 1,500 feet along the vein or lode, but provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located, which is, in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode.

The section also declares that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at its surface, except as prevented by adverse rights existing on the 10th day of May, 1872, and that the end lines of each claim shall be parallel to each other. A claim located in conformity with the provisions of this section would take the form of a parallelogram, if the course or strike of the vein or lode should run in a straight line; but such veins and lodes are often found, upon explorations, to run in a course deviating at different points from such line, and from this circumstance much difficulty often arises, in determining the lateral rights of the locators.

Section 2324 of the Revised Statutes recognizes the power of miners in each mining district to make regulations not in conflict with the laws of the United States, or of the laws of the state or territory in which the district is situated, governing the location, manner of locating, and amount of work necessary to hold possession of a mining claim, subject to the requirement that the location must be distinctly marked on the ground, so that its boundaries may be readily traced.

It is evident from the provisions cited that the location, as made and defined, must control, not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights.

Section 2322, cited above, declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the tox or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, and ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location. The surface side lines, extended downward vertically, therefore, determine the extent of the claim, except when, in its descent, the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines.

The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called "side lines" of the location, as shown in the diagram, are not such, in fact, but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than 300 feet from the middle of such vein. In the Amy claim, the lines marked as side lines cross the course of the strike of the vein, and do not run parallel with it. They therefore constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein, from further developments. But as was said by this court in Iron Silver Min. Co. v. Elgin Min. & Smelting Co., 118 U. S. 196, 207, 6 Sup. Ct. 1177: "If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences." The court cannot become a locator for the mining claimant, and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants, under the statute. It cannot relocate his claim,

and make new side lines or end lines. Where it finds, as in this case, that what are called "side" lines are in fact "end" lines, the court in determining his lateral rights, will treat such side lines as end lines, and such end lines as side lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law.

Acting upon this principle, there is no lateral right to the holder of the Amy claim, by which he can follow its vein into the Non-Consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made "to ascertain, as near as possible, the course and direction of the vein. * * * Even then," the court added, "with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein; but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subjected to perpetual readjustment according to subterranean developments subsequently made by mine workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims."

Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owner's right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the "north side" of its claim, as that side line so called was, in fact, one of its end lines.

The judgment of the supreme court of Montana should therefore be reversed, and judgment entered in favor of the plaintiff, for a decree of partition of the Non-Consolidated claim between the parties of the suit, who are owners as tenants in common, provided such partition can be made with due regard to the respective rights of the owners, and, if it cannot be thus advantageously made, that the premises be sold, and the proceeds divided according to their respective rights, and, further, that the respective parties render an account of the proceeds received by them, respectively, from the Non-Consolidated claim, and that such proceeds be divided between them according to their respective rights.

And it is so ordered.

EMPIRE MILLING & MINING CO. v. TOMBSTONE MILL & MINING CO.

1900. Circuit Court, D. Connecticut. 100 Fed. 910.

Townsend, District Judge.[6]—Demurrers to answer in an action at law. * * *

The next question raised by the demurrers affects the ownership of the ore beneath the surface. Defendant, in extending its shafts into the territory included within the surface lines of plaintiff's mine, found that in making their original location they mistook the direction of the lode, and made said location crosswise instead of lengthwise of the vein. In following the vein under plaintiff's surface lines, they found that the vein, the apex of which was on their property, extended laterally under the surface of plaintiff's location. * * *

The question here raised and claimed to be novel is this: In such a case, do the end lines become side lines in the sense that the locator may follow the dip of the vein outside of a plane extended vertically downward therefrom? In Mining Co. v. Tarbet, 98 U. S. 463, 38 L. Ed. 253, the court said, referring to such a condition:

"It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. * * * The location of the plaintiffs in error is thus laid across the Titus lode,—that is, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of their claim, considering the direction or course of the lode at the surface. As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines, properly so called, which lines are those which are crosswise of the general course of the vein on the surface."

Counsel for plaintiff claims that, inasmuch as the individual who locates his claim crosswise of a vein makes a mistake in so doing, he must suffer the penalty for said mistake, and that beyond the vertical plane of his boundary lines he has no extralateral rights. That is to say, that the end lines as originally located remain end lines in the sense of the statute, while the original side lines also become end lines, and the claim thus becomes bounded by four end lines, beyond the vertical planes of none of which the owner may follow the dip of the lode. Counsel for defendant contends that, inasmuch as the supreme court has repeatedly, without any qualifications, said that the side lines in such case become the end lines and the end lines side lines, and as the statute defines what shall be the rights of a locator with reference to his end and side lines, those

[6] Parts of the opinion are omitted.

rights attach as a matter of course to the new side lines, and that the party who makes the mistake is sufficiently punished or limited by reason of the fact that he cannot extend his boundaries beyond the new end lines. Although no decision has been cited where this precise question was in issue, the latter view seems more in accord with the language and spirit of the decisions in somewhat analogous cases. Thus, in King v. Mining Co., 152 U. S. 222, 228, 14 Sup. Ct. 512, 38 L. Ed. 422, the court says:

"The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim, and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are in fact end lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines."

In Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859, Mr. Justice Brewer, in delivering the opinion of the court, says:

"The course of this vein is across the Last Chance claim, instead of in the direction of its length. Under those circumstances the side lines of that location become the end lines, and the end the side lines. Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; King v. Mining Co., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed 419."

In Consolidated Wyoming Gold-Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540, 547, the general principle is thus stated:

"When a mining claim is located across, instead of along, the lode, its side lines must be treated as its end lines, and its end lines as its side lines; so that, under Rev. St. § 2322, the dip cannot be followed outside the vertical plane of the original side lines into an adjoining claim."

The principle above stated seems to be in accord with that of the decisions in the following cases, in most of which the lode, while passing through the end of the claim as located, passed out at one of the sides, or from some other cause failed to reach the other end. Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; King v. Mining Co., 152 U. S. 222, 14 Supt. Ct. 510, 38 L. Ed. 419; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Walrath v. Mining Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170. A careful examination of the case of Catron v. Olds (Colo. Sup.) 48 Pac. 687, relied on by counsel for plaintiff, shows that the question herein involved was not presented on the record. The demurrers on this point are overruled.[7] * * *

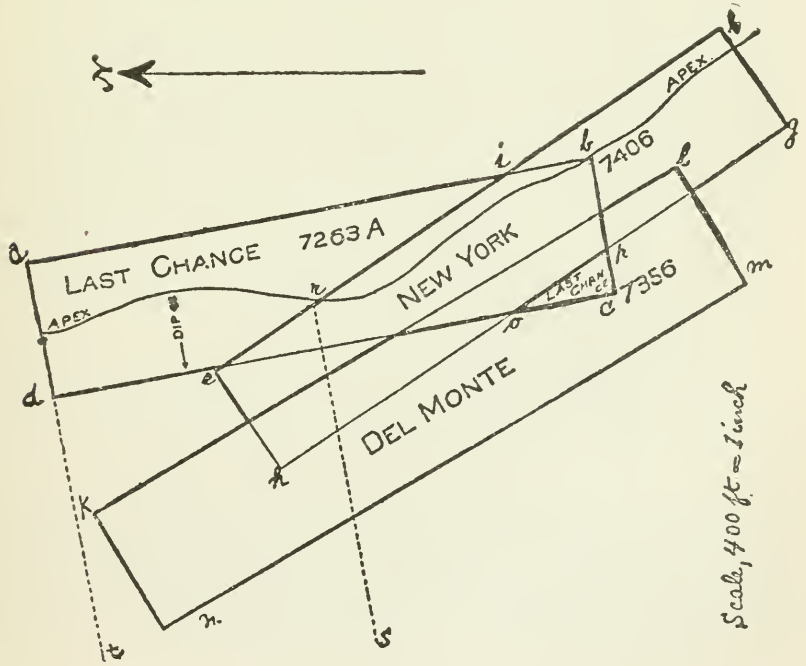
[7] In Morrison's Mining Rights, 14 Ed., 206–207, Messrs. Morrison & DeSoto take a position opposed to this case. But the principal case is believed to be sound. See Costigan, Mining Law, 422–425.

DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO.

1898. Supreme Court of the United States. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. 895.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

This case is before this court on questions certified by the court of appeals for the Eighth circuit. The facts stated are as follows: The appellant is the owner in fee of the Del Monte lode mining claim, located in the Sunnyside mining district, Mineral county, Colo., for which it holds a patent bearing date February 3, 1894, pursuant to an entry made at the local land office on February 27, 1893. The appellee is the owner of the Last Chance lode mining claim, under patent dated July 5, 1894, based on an entry of March 1, 1894. The New York lode mining claim, which is not owned by either of the parties, was patented on April 5, 1894, upon an entry of August 26, 1893. The relative situation of these claims, as well as the course and dip of the vein, which is the subject of controversy, is shown on the following diagram:



Both in location and patent the Del Monte claim is first in time, the New York second, and the Last Chance third. When the owners of the Last Chance claim applied for their patent, proceedings in adverse were instituted against them by the owners of the New York claim, and an action in support of such adverse was brought in the United States circuit court for the district of Colorado. This action terminated in favor of the owners of the New York and against the owners of the Last Chance, and awarded the territory in conflict between the two locations to the New York claim. The ground in conflict between the New York and Del Monte, except so much thereof as was also in conflict between the Del Monte and Last Chance locations, is included in the patent to the Del Monte claim. The New York secured a patent to all of its territory except that in conflict with the Del Monte, and the Last Chance in turn secured a patent to all of its territory except that in conflict with the New York, in which last-named patent was included the triangular surface conflict between the Del Monte and Last Chance, which, by agreement, was patented to the latter. The Last Chance claim was located upon a vein, lode, or ledge of silver and lead bearing ore, which crosses its north end line, and continues southerly from that point through the Last Chance location until it reaches the eastern side line of the New York, into which latter territory it enters, continuing thence southerly with a southeasterly course on the New York claim until it crosses its south end line. No part of the apex of the vein is embraced within the small triangular parcel of ground in the southwest corner of the Last Chance location which was patented to the Last Chance as aforesaid, and no part of the apex is within the surface boundaries of the Del Monte mining claim. The portion of the vein in controversy is that lying under the surface of the Del Monte claim, and between two vertical planes; one drawn through the north end line of the Last Chance claim extending westerly, and the other parallel thereto, and starting at the point where the vein leaves the Last Chance and enters the New York claim, as shown on the foregoing diagram. Upon these facts the following questions have been certified to us:

"(1) May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?

"(2) Does the patent of the Last Chance lode mining claim, which first describes the rectangular claim by metes and bounds, and then excepts and excludes therefrom the premises previously granted to the New York lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the

two irregular tracts which constitute the granted surface of the Last Chance claim?

"(3) Is the easterly side of the New York lode mining claim an 'end line' of the Last Chance lode mining claim, within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?

"(4) If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?

"(5) On the facts presented by the record herein, has the appellee the right to follow its vein downward beyond its west side line, and under the surface of the premises of appellant?"

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The questions thus presented are not only important but difficult, involving as they do the construction of the statutes of the United States in respect to mining claims. As leading up to a clear understanding of those statutes it may be well to notice the law in existence prior thereto. The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the States and Territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface. Unquestionably at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface, but the possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of a contract, in no manner abridged the general proposition that the owner of the surface owned all beneath. It is said by Lindley, in his work on Mines, (Vol. 1, Sec. 4,) that in certain parts of England and Wales so called local customs were recognized which modified the general rule of the common law, but the existence of such exceptions founded upon such local customs only accentuates the general rule. The Spanish and Mexican mining law confined the owner of a mine to perpendicular lines on every side. Mining Company v. Tarbet, 98 U. S. 463, 468; 1 Lindley on Mines, sec. 13. The peculiarities of the Mexican law are discussed by Lindley at some length in the section referred to. It is enough here to notice the fact that by the Mexican as by the common law the surface rights limited the rights below the surface.

In the acquisition of foreign territory since the establishment of this government the great body of the land acquired became the property of the United States, and is known as their "public lands." By virtue of this ownership of the soil the title to all mines

and minerals beneath the surface was also vested in the Government. For nearly a century there was practically no legislation on the part of Congress for the disposal of mines or mineral lands. The statute of July 26, 1866, c. 262, 14 Stat. 251, was the first general statute providing for the conveyance of mines or minerals. Previous to that time it is true that there had been legislation respecting leases of mines, as, for instance, the act of March 3, 1807, c. 49, § 5, 2 Stat. 448, 449, which authorized the President to lease any lead mine in the Indiana Territory for a term not exceeding five years; and acts providing for the sale of lands containing lead mines in special districts, act of March 3, 1829, c. 55, 4 Stat. 364; act of July 11, 1846, c. 36, 9 Stat. 37; act of March 1, 1847, c. 32, 9 Stat. 146; act of March 3, 1847, c. 54, 9 Stat. 179; also such legislation as is found in the act of February 27, 1865, c. 64, 13 Stat. 440, providing for a District and Circuit Court for the District of Nevada, in which it was said, in section 9: "That no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of possession;" that of May 5, 1866, c. 73, 14 Stat. 43, concerning the boundaries of the State of Nevada, which provided that "all possessory rights acquired by citizens of the United States to mining claims, discovered, located and originally recorded in compliance with the rules and regulations adopted by miners in the Pah-Ranagat and other mining districts in the territory incorporated by the provisions of this act into the State of Nevada shall remain as valid subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining States and Territories;" and the act of July 25, 1866, c. 244, 14 Stat. 242, which, granting to A. Sutro and his assigns certain privileges to aid in the construction of a tunnel, conferred upon the grantees the right of pre-emption of lodes within two thousand feet on each side of said tunnel. Two laws were also passed regulating the sale and disposal of coal lands; one on July 1, 1864, c. 205, and one on March 3, 1865, c. 107, 13 Stat. 343, 529.

Notwithstanding that there was no general legislation on the part of Congress, the fact of explorers searching the public domain for mines, and their possessory rights to the mines by them discovered, was generally recognized, and the rules and customs of miners in any particular district were enforced as valid. As said by this court in Sparrow v. Strong, 3 Wall. 97, 104: "'We know, also, that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. And we cannot shut our eyes to the pub-

lic history, which informs us that under this legislation, and not only without interference by the National Government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." See also Forbes v. Gracey, 94 U. S. 762; Jennison v. Kirk, 98 U. S. 453, 459; Broder v. Water Company, 101 U. S. 274, 276; Manuel v. Wulff, 152 U. S. 505, 510; Black v. Elkhorn Mining Company, 163 U. S. 445, 449.

The act of 1866 was, however, as we have said, the first general legislation in respect to the disposal of mines. The first section provided: "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The second section gave to a claimant of a vein or lode of quartz, or other rock in place, bearing gold, etc., the right "to file in the local land office a diagram of the same * * * and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." The purpose here manifested was the conveyance of the vein, and not the conveyance of a certain area of land within which was a vein. Section 3, which set forth the steps necessary to be taken to secure a patent and required the payment of five dollars per acre for the land conveyed, added: "But said plat, survey or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." Nowhere was there any express limitation as to the amount of land to be conveyed, the provision in section 4 being: "That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: And provided further, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons."

Obviously, the statute [of 1866] contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as

to the surface area or the form of the surface location, leaving the land department in each particular case to grant so much of the surface as was "fixed by local rules," or was, in the absence of such rules, in its judgment, necessary for the convenient working of the mine. The party to whom the vein was thus patented was permitted to follow it on its dip to any extent, although thereby passing underneath lands to which the owner of the vein had no title.

As might be expected, the patents issued under this statute described surface areas very different, and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight or in a curved or irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules, and conveyed a similar area. Even under this statute, although its express purpose was primarily to grant the single vein, yet the rights of the patentee beneath the surface were limited and controlled by his rights upon the surface. If, in fact, as shown by subsequent explorations, the vein, on its course or strike, departed from the boundary lines of the surface location, the point of departure was the limit of right. In other words, he was not entitled to the claimed and patented number of feet of the vein, irrespective of the question whether the vein in its course departed from the lines of the surface location.

The litigation in respect to the Flagstaff mine in Utah illustrates this. There was a local custom giving to the locator of a mine fifty feet in width on either side of the course of the vein, and the Flagstaff patent granted a superficies one hundred feet wide by twenty-six hundred feet long, with the right to follow the vein described therein to the extent of twenty-six hundred feet. It turned out that the vein, instead of running through this parallelogram lengthwise, crossed the side lines, so that there was really but a hundred feet of the length of the vein within the surface area. On either side of the Flagstaff ground were other locations, through which the vein on its course passed. As against these two locations the owners of the Flagstaff claimed the right to follow the vein on its course or strike to the full extent of twenty-six hundred feet. This was denied by the Supreme Court of Utah. McCormick v. Varnes, 2 Utah 355. In that case the controversy was with the location on the west of the

Flagstaff. The decisions of that court in respect to the controversy with the location on the east of he Flagtsaff is not reported, but the case came to this court. Mining Company v. Tarbet, 98 U. S. 463. In the course of the opinion (pages 467, 468) it was said:

"It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to."

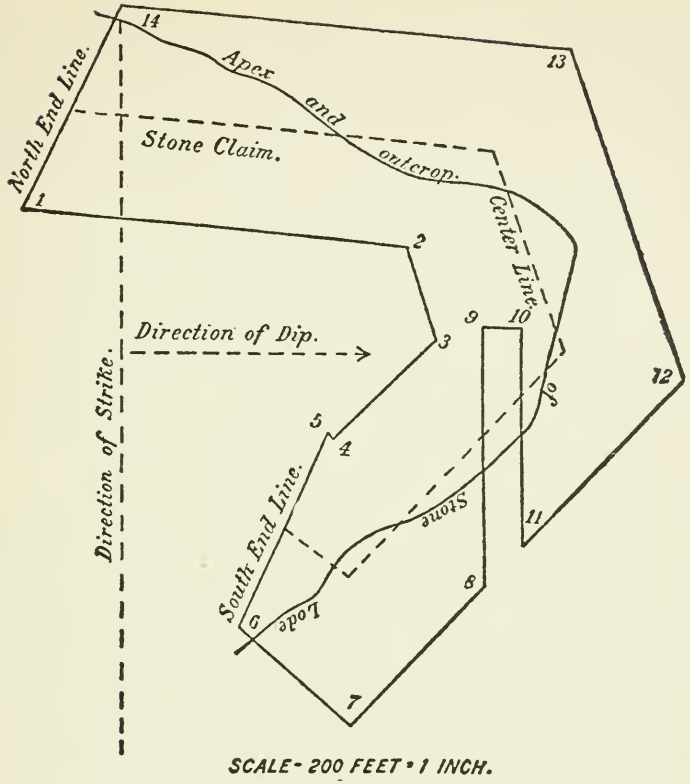
These decisions show that while the express purpose of the statute [of 1866] was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent. This act of 1866 remained in force only six years, and was then superseded by the act of May 10, 1872 (17 Stat. 91), found in the Revised Statutes (section 2319 and following). This is the statute which is in force today, and under which the controversies in this case arise. Section 2319, Rev. St. (corresponding to section 1 of the act of 1872), reads:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs, or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the law of the United States."

It needs no argument to show that, if this were the only section bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given, and upon what conditions they may be exercised. And it must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity a party may follow a vein into the territory of his neigh-

bor, and appropriate it to his own use. If cases arise for which congress has made no provision, the courts cannot supply the defect. Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory. It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized, and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along its course or strike, a right to follow that vein on its dip for the same length ought to be awarded to him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level, and veins constantly pursued a straight line, there would be little difficulty in legislation to provide for all contingencies; but mineral is apt to be found in mountainous regions where great irregularity of surface exists, and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive. We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and, if so, it were well if congress could be persuaded to enact them into statute; but, be that as it may, the question in the courts is not what is equity, but what saith the statute. Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. Section 2320. It is not within the province of the courts to ignore such provision, and hold that a locator, failing to comply with its terms, has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied; and so it has been adjudged. Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177.

This case, which is often called the "Horseshoe Case," on account of the form of the location, is instructive. The following diagram, which was in the record in that case, illustrates the scope of the decision:



The locator claimed in his application for a patent the lines 1, 14, and 5, 6, as the end lines of his location, and, because of their parallelism, that he had complied with the letter of the statute; but the court ruled against him, saying in the opinion (page 208, 118 U. S., 1184, 6 Sup. Ct.):

"The exterior lines of the Stone claim formed a curved figure somewhat in the shape of a horseshoe, and its end lines are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draftsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure, and apparently for no other reason than their parallelism called them end lines. We are therefore of opinion that the objection that, by reason of the surface form of the Stone claim, the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof."

It is true, the court also observed that, if the two lines named by

the locator were to be considered the end lines, no part of the vein in controversy fell "within vertical planes drawn down through those lines continued in their own direction." But, notwithstanding this observation, the point of the decision was that the lines which were the end lines of the location as made on the surface of the ground were not parallel, and that this defect could not be obviated by calling that which was in fact a side line an end line. This is made more clear by the observations of the chief justice, who, with Mr. Justice Bradley, dissented, in which he said:

"I cannot agree to this judgment. In my opinion, the end lines of a mining location are to be projected parallel to each other and crosswise of the general course of the vein within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downward, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface."

In other words, the court took the location as made on the surface by the locator, determined from that what were the end lines, and made those surface end lines controlling upon his rights; and rejected the contention that it was proper for the court to ignore the surface location, and create for the locator a new location whose end lines should be crosswise of the general course of the vein as finally determined by explorations. That this decision and that in the Tarbet Case, supra, [98 U. S. 463] were correct expositions of the statute, and correctly comprehended the intent of congress therein, is evident from the fact that, although they were announced in 1885 and 1878, respectively, congress has not seen fit to change the language of the statute, or in any manner to indicate that any different measure of rights should be awarded to a mining locator.

With these preliminary observations, we pass to a consideration of the questions propounded. The first is:

"May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

By section 2319, quoted above, the mineral deposits which are declared to be open to exploration and purchase are those found in lands belonging to the United States, and such lands are the only ones open to occupation and purchase. While this is true, it is also true that until the legal title has passed the public lands are within the jurisdiction of the land department, and, although equitable rights may be established, congress retains a certain measure of control. Lumber Co. v. Rust, 168 U. S. 589, 18 Sup. Ct. 208. The grant is, as is often said, in process of administration. Passing to

section 2320, beyond the recognition of the governing force of customs and regulations and a declaration as to the extreme length and width of a mining claim it is provided that: "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * * The end lines of each claim shall be parallel to each other."

Section 2322 gives to the locators of all mining locations, so long as they comply with laws of the United States, and with state, territorial, and local regulations not in conflict therewith, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession of such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Section 2324 in terms authorizes "the miners of each mining district to make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or

mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 provides for the issue of a patent. It reads:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United State surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 is as follows:

"Where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the titled conveyed by a patent for a mining claim to any person whatever."

These are the only provisions of the statute which bear upon the question presented.

The stress of the argument in favor of a negative answer to this question lies in the contention that by the terms of the statute exclusive possessory rights are granted to the locator. Section 2322 declares that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," and negatively that "nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Hence it is said that affirmatively and negatively is it provided that the locator shall have exclusive possession of the surface, and that no one shall have a right to disturb him in such possession. How, then, it is

asked, can any one have a right to enter upon such location for the purpose of making a second location? If he does so, he is a trespasser, and it cannot be presumed that congress intended that any rights should be created by a trespass.

We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called in section 2320 and elsewhere a "claim" or a "mining claim." Indeed, the words "claim" and "location" are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim, works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other, and include the same ground, for then the right of possession becomes a matter of dispute, but no location creates a right superior to any previous valid location. And these possessory rights have always been recognized and disputes concerning them settled in the courts.

It will also be noticed that the locator is not compelled to follow the lines of the government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys; but, whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein, and the discoverer desire to take the entire surface, and yet it be impossible for him to do so, and make his end lines parallel, unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment. The thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced, vein, as is possible.

Further, congress has not prescribed how the location shall be made. It has simply provided that it "must be distinctly marked on the ground, so that its boundaries can be readily traced," leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such loca-

tion shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the locations, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves, —men inexperienced in the matter of surveying,—and so, in the nature of things, there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities the posts, stakes, or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken, such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of the existence of any prior claim. And in all places posts, stakes, or other monuments, although sufficient at first, and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered, naturally many locators hurry to seek by early locations to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that around any new discovery there quickly grows up what is called a "mining camp," and the contiguous territory is prospected, and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made; and, indeed, in every mining camp where large discoveries have been made locations in fact overlap each other again and again. McEvoy v. Hyman, 25 Fed. 596–600. This confusion and conflict is something which must have been expected, foreseen; something which, in the nature of things, would happen, and the legislation of congress must be interpreted in the light of such foreseen contingencies.

Still again, while a location is required by the statute to be plainly marked on the surface of the ground, it is also provided in section 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to relocation. Now, although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it cannot be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is invalid, or

has failed, before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location.

Congress has, in terms, provided for the settlement of disputes and conflicts, for by section 2325, when a locator makes application for a patent (thus seeking to have a final determination by the land department of his title), he is required to make publication and give notice so as to enable any one disputing his claim to the entire ground within his location to know what he is seeking, and any party disputing his right to all or any part of the location may institute adverse proceedings. Then, by section 2326, proceedings are to be commenced in some appropriate court, and the decision of that court determines the relative rights of the parties. And the party who, by that judgment, is shown to be "entitled to the possession of the claim, or any portion thereof," may present a certified copy of the judgment roll to the proper land officers and obtain a patent "for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightfully possess." And that the claim may be found to belong to different persons, and that the right of each to a portion may be adjudicated, is shown by a subsequent sentence in that same section, which provides that, "if it appears from a decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, * * * and patents shall issue to the several parties according to their respective rights." So it distinctly appears that, notwithstanding the provision in reference to the rights of the locators to the possession of the surface ground within their locations, it was perceived that locations would overlap, that conflicts would arise, and a method is provided for the adjustment of such disputes. And this, too, it must be borne in mind is a statutory provision for the final determination, and is supplementary to that right to enforce temporary possession, which, in accordance with the rules and regulations of mining districts, has always been recognized.

This question is not foreclosed by any decisions of this court, as suggested by counsel. It is true, there is language in some opinions which, standing alone, seems to sustain the contention. Thus, in Belk v. Meagher, 104 U. S. 279, 284, it is said:

"Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law

allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

And again, in Gwillim v. Donnellan, 115 U. S. 45, 49, 5 Sup. Ct. 1112:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second."

The question presented in each of those cases was whether a second location is effectual to appropriate territory covered by a prior subsisting and valid location, and it was held it is not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location. But that is not the question here presented. Indeed, the form in which it is put excludes any impairment or disturbance of the substantial rights of the prior locator. The question is whether the lines of a junior lode location may be laid upon a valid senior location for the purpose of defining or securing "underground or extralateral rights not in conflict with any rights of the senior location." In other words, in order to comply with the statute, which requires that the end lines of a claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, may a junior locator place an end line within the limits of a prior location?

In that aspect of the question the decisions referred to, although the language employed is general and broad, do not sustain the contention of counsel. This distinction is recognized in the text-books. Thus, in 1 Lindl. Mines, § 363, the author says:

"As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors, and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent. Many of them arise from honest mistake, others from premeditated design. In both instances the question of priority of appropriation is the controlling element which determines the rights of the parties. Two locations cannot legally occupy the same space at the same time. These con-

flicts sometimes involve a segment of the same vein on its strike; at others they involve the dip bounding planes underneath the surface. More frequently, however, they pertain to mere overlapping surfaces. The same principles of law apply with equal force to all classes of cases. Such property rights as are conferred by a valid prior location, so long as such location remains valid and subsisting, are preserved from invasion, and cannot be infringed or impaired by subsequent locators. To the extent, therefore, that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void."

It will be seen that, while the author denies the right of a second locator to enter upon the ground segregated by the first location, he recognizes the fact that overlapping locations are frequent, and declares the invalidity of the second location so far as it affects the rights vested in the prior locator, and in that he follows the cases from which we have quoted.

The practice of the land department has been in harmony with this view. The patents which were issued in this case for the Last Chance and New York claims give the entire boundaries of the original locations, and except from the grant those portions included within prior valid locations. So that on the face of each patent appears the original survey with the parallel end lines, the territory granted, and the territory excluded. The instructions from the land department to the surveyors general have been generally in harmony with this thought. Thus, in a letter from the commissioner of the land office to the surveyor general of Colorado of date November 5, 1874, reported in 1 Copp's Landowner (page 133), are these instructions:

"In this connection I would state that the surveyor general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims.

"Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim as located, if held by him in accordance with the local laws and congressional enactments.

"If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plat and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the established corners at which the exterior boundaries of the respective surveys intersect each other."

Again, in a general circular issued by the land department on November 16, 1882, found in 9 Copp's Landowner (page 162), it is said:

"The regulations of this office require that the plats and field notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

"The rule has not been properly observed in all cases. Your attention is invited to the following particulars, which should be observed in the survey of every mining claim:

"(1) The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

"(2) The intersections of the lines of the survey, with the lines of conflicting prior surveys, should be noted in the field notes and represented upon the plat.

"(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

"(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows."

Again, on August 2, 1883, in a letter from the acting commissioner to the surveyor general of Arizona, reported in 10 Copp's Landowner, p. 240, it is said:

"You state, and it is shown to be so by said diagram, that the said Grand Dipper lode, so located, is a four-sided figure with parallel end lines, the provisions of section 2320, Rev. St. U. S., being fully complied with.

"The survey of the claim made by the deputy surveyor cuts off a portion of the right end, shown to be in conflict with the Emerald lode, the easterly end line of the Emerald claim thus becoming one of the boundary lines of the said 'Grand Dipper,' and not parallel to the easterly end line of the Grand Dipper survey.

"I cannot see how you can give your approval to such survey. No reason exists why the survey lines should not conform directly to the lines of the location, they being properly run in the first instance."

It is true that on December 4, 1884, a circular letter was issued by the land department which slightly qualifies the general instructions previously issued. So that it may, perhaps, be truthfully said that the practice of the land department has not been absolutely uniform; and yet the descriptions which are found in the patents before us show that, notwithstanding the circular of 1884, the former practice still obtains.

It may be said that the statute gives to the first locator the right of exclusive possession; that an entry upon that territory with a view of making a subsequent location and marking on the ground its end and side lines is a trespass; and that to justify such an entry is to sanction a forcible trespass, and thus precipitate a breach of the peace. But no such conclusion necessarily follows. The case of Atherton v. Fowler, 96 U. S. 513, illustrates this. It appeared that one Page was in lawful possession of certain premises claimed under a Mexican grant, though his title had not been confirmed by any act of congress; that while so in possession a party of persons, who had no interest or claim to any part of the land, invaded it by force, tore down the fences, dispossessed those who occupied, and built on and cultivated parts of it under pretense of establishing a right of pre-emption to the several parts which they had so seized. It was

held that such forcible seizure of the premises gave no rights under the pre-emption law, and it was said (page 516):

"It is not to be presumed that congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In the parts of the country where these pre-emptions are usually made, the protection of the law to rights of person and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that congress has extended a standing invitation to the strong, the daring, and the unscrupulous to dispossess by force the weak and the timid from actual improvements on the public lands, in order that the intentional trespasser may secure by these means the preferred right to buy the land of the government when it comes into market."

But, while thus declaring that it cannot be presumed that congress countenanced any such forcible seizure of premises, the court also observed (page 516):

"Undoubtedly, there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter section of land may present conflicting claims to the right of pre-emption of the whole quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open, uninclosed, and neither party interferes with the actual possession of the other. In such cases, the settlement of the latter of the two may be bona fide for many reasons. The first party may not have the qualifications necessary to a pre-emptor, or he may have pre-empted other land, or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another person may become pre-emptor, or it may not be known that the settlements are on the same quarter."

The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession, and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, uninclosed, and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain, and where the validity of apparent locations is unsettled and doubtful. Under those circumstances it is not strange —on the contrary, it is something to be expected and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while, in the adjustment of those conflicts, the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for

all purposes, and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—go through the form of making a relocation, simply works delay, and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines.

In this connection it may be properly inquired, what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township, and section system? Clearly not. While the contemplation of congress may have been that every location should be in the form of a parallelogram, not exceeding 1,500 by 600 feet in size, yet the purpose also was to permit the location in such a way as to secure not exceeding 1,500 feet of the length of a discovered vein, and it was expected that the locator would so place it as, in his judgment, would make the location lengthwise cover the course of the vein. There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downward outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his location, and the end lines must be parallel, in order that going downward he shall acquire no further length of the vein than the planes of those lines extended downward inclose. If the end lines are not parallel, then, following their planes downward, his rights will be either converging and diminishing or diverging and increasing the further he descends into the earth. In view of this purpose and effect of the parallel end lines, it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights.

For these reasons, therefore, we are of opinion that the first question must be answered in the affirmative.[9]

[9] See an article on "An Anomaly in Mining Law" by Judge Theodore Brantly in 20 Yale Law Journal 548.

It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. In other words, referring to the first diagram, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line r, s, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line e, h, the end line of the New York claim, extended downward into the earth will at a certain distance pass to the south of the line r, s, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, b, c, extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter.[10] All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line a, d, t and the line r, s, and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration.

The second question needs no other answer than that which is contained in the discussion we have given to the first question, and we therefore pass it.

The third question is also practically answered by the same considerations, and, in the view we have taken of the statutes, the easterly side of the New York lode mining claim is not the end line of the Last Chance lode mining claim.

The fourth question presents a matter of importance, particularly in view of the inferences which have been drawn by some trial courts, state and national, from the decisions of this court. That question is:

"If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?"

The decisions to which we refer are Mining Co. v. Tarbet, 98 U. S. 463; Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356; King v. Mining Co., 152 U. S. 222, 14 Sup. Ct. 510.

Two of these cases have been already noticed in this opinion. In

[10] See note 13, post.

Mining Co. v. Tarbet a surface location 2,600 feet long and 100 feet wide had been made. This location was so made on the supposition that it followed lengthwise the course of the vein, and the claim was of the ownership of 2,600 feet in length of such vein. Subsequent explorations developed that the course of the vein was at right angles to that which had been supposed, and that it crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. It was held that the side lines were to be regarded as the end lines. In Iron Silver Min. Co. v. Elgin Min. Co. the location was in the form of a horseshoe. The end lines were not parallel. The location was quite irregular in form, and, inasmuch as one of the side lines was substantially parallel with one of the end lines, it was contended that this side line should be considered an end line, and this although the vein did not pass through such side line. But the court refused to recognize any such contention, and held that the end lines were those which were in fact end lines of the claim as located, and that, as they were not parallel, there was no right to follow the vein on its dip beyond the side lines. In Argentine Min. Co. v. Terrible Min. Co. the claims of the plaintiff and defendant crossed each other and in its decision the court affirmed the ruling in Mining Co. v. Tarbet, saying (page 485, 98 U. S.):

"When, therefore, a mining claim crosses the course of the lode or vein instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface."

In King v. Mining Co. the prior cases were reaffirmed, and those lines which on the face of the location were apparently side lines were adjudged end lines because the vein on its course passed through them, the location being not along the course of the vein but across it. But in neither of these cases was the question now before us presented or determined. All that can be said to have been settled by them is: First, that the lines of the location as made by the locator are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location; second, that the contemplation of the statute is that the location shall be along the course of the vein, reading, as it does, that a mining claim "may equal, but shall not exceed, 1,500 feet in length along the vein or lode"; and, third, that when subsequent explorations disclose that the location has been made not along the course of the vein, but across it, the side lines of the location become in law the end lines. Nothing was said in either of these cases as to how much of the apex of the vein must be found within the surface, or what rule obtains in case the vein crosses only one end line. So, when Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 696, 15 Sup. Ct. 733, was before us (in which the question here stated was presented, but not

decided, the case being disposed of on another ground), we said, after referring to the prior cases, "But there has been no decision as to what extraterritorial rights exist if a vein enters at one end and passes out at a side line."

We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of a vein makes the location; that he is entitled to make a location not exceeding 1,500 feet in length along the course of such vein, and not exceeding "three hundred feet on each side of the middle of the vein at the surface"; that a location thus made discloses end and side lines; that he is required to make the end lines parallel; that by such parallel end lines he places limits not merely to the surface area, but limits beyond which below the surface he cannot go on the course of the vein; that it must be assumed that he will take all of the length of the vein that he can,—we find from section 2322 that he is entitled to "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, "although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the "right of possession to such outside parts of such veins or ledges shall be confined to such portion thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or lodes."

This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side lines. Naming limits beyond which a grant does not go is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines. And this is all

that the statute provides. Suppose a vein enters at an end line, but terminates half way across the length of the location, his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the further end line. It is a vein, "the top or apex of which lies outside of such surface lines extended downward vertically." And the same is true if it enters at an end and passes out at a side line.

Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein "the top or apex of which lies inside of such surface lines extended downward vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines; and this upon the proposition that it was the intent of congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. "Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." Mining Co. v. Tarbet, 98 U. S. 463, 468.

These conclusions find support in the following decisions: Stevens v. Williams, 1 McCrary, 480, 490, Fed. Cas. No. 13,413, in which is given the charge of Mr. Justice Miller to a jury, in the course of which he says: "You must take all the evidence together; you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, and the course it takes; and from all that you are to say what is its general course. The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines, vertically extended, as though they were his end lines; but, if he happens to strike out diagonally, as far as his side lines include the apex, so far he can pursue it laterally." Wakeman v. Norton (decided by the

supreme court of Colorado, June 1, 1897) 49 Pac. 283, in which Mr. Justice Goddard, whose opinions, by virtue of his long experience as trial judge in the mining districts of Leadville and Aspen as well as on the supreme bench of the state, are entitled to great consideration, said (page 286): "In instructing the jury that, in order to give any extralateral rights, it was essential that the apex or top of a vein should on its course pass through both end lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases." Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273,—a case now pending in this court on writ of error. Tyler Min. Co. v. Last Chance Min. Co. (court of appeals, Ninth circuit, decided by Circuit Judge McKenna, now a justice of this court, Circuit Judge Gilbert, and District Judge Hawley) 7 U. S. App. 463, 4 C. C. A. 329, and 54 Fed. 284. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (circuit court, Northern district, California, decided by Hawley, District Judge) 63 Fed. 540. Tyler Min. Co. v. Last Chance Min. Co. (circuit court, district of Idaho), decided by Beatty, District Judge, who, in the course of his opinion pertinently observed: "What reason, under the law, can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following 'all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines.' Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of its location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take all from the law that is of value to the miner." 71 Fed. 848, 851. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (circuit court, Northern district of California, decided by Beatty, District Judge) 73 Fed. 597. Republican Min. Co. v. Tyler Min. Co. (circuit court of appeals, Ninth circuit, decided by Circuit Judges Gilbert and Ross and District Judge Hawley) 48 U. S. App. 213, 25 C. C. A. 178, and 79 Fed. 733. See, also, 2 Lindl. Mines, § 591.

The fourth question, therefore, is answered in the affirmative.

The fifth question, in effect, seeks from this court a decision of the whole case, and therefore is not one which this court is called upon to answer. Cross v. Evans, 167 U. S. 60, 17 Sup. Ct. 733; Warner v. New Orleans, 167 U. S. 467, 17 Sup. Ct. 892.

It will therefore be certified to the court of appeals that the first question is answered in the affirmative, the third in the negative, the fourth in the affirmative. The second and fifth are not answered.

STATE EX REL. ANACONDA COPPER-MIN. CO. ET AL. v. DISTRICT COURT OF SECOND JUDICIAL DIST. OF SILVER BOW COUNTY ET AL.

1901. SUPREME COURT OF MONTANA. 25 Mont. 504, 65 Pac. 1020.

APPLICATION by the state, on the relation of the Anaconda Copper-Mining Company and another, for a writ of supervisory control directing the judge of the district court of the Second judicial district of Silver Bow county and another to reverse an order issued in proceedings therein. Writ issued.

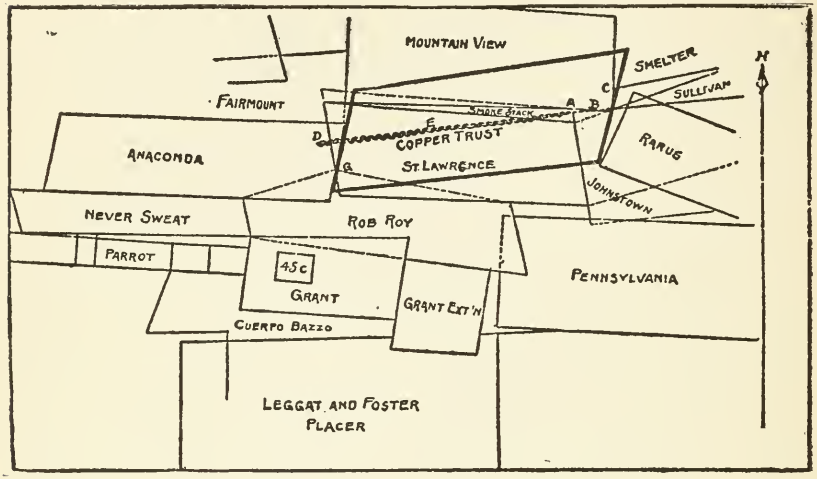
BRANTLY, C. J.[11]—On December 20, 1899, one Burdette O'Connor brought an action in the district court of Silver Bow county against the Anaconda Copper-Mining Company and the Washoe Copper Company, corporations, the relators herein, alleging that he was the owner of the Copper Trust lode claim, situate in Silver Bow county, and that the defendants had theretofore trespassed upon his rights therein by entering within its boundaries, and extracting and carrying away ores therefrom to the value of $2,000,000, to his damage in that amount. Under a separate cause of action incidental relief was sought by way of injunction. The cause is still pending in the district court, the issues therein not having been made up at the time the present controversy arose. On March 26, 1901, for the purpose of obtaining evidence to aid him in the trial of said cause, the said O'Connor filed therein a petition asking the court for an order permitting him to inspect and survey all the underground workings in the Anaconda, St. Lawrence, Never Sweat, Rob Roy, Grant, Grant Extension, Parrott, Lot 45 C, and the Cuerpo Bazzo lode claim, and also in the Leggatt and Foster placer claim, all of which the complaint alleges are in possession of defendants, or one of them, and through which defendants had entered upon the ore bodies belonging to the Copper Trust, and committed the trespasses complained of. The situation of the ore bodies in controversy, as shown by the evidence submitted to the court at the hearing, and the respective claims of the contending parties, will be readily understood from the subjoined diagram:[11a]

The exterior boundaries of the Copper Trust lode are indicated by the heavy lines. This claim overlies the Smoke Stack lode, and most of the surface of the St. Lawrence. It will be noted that all of the claims mentioned, both the Copper Trust and those belonging to the relators, have parallel end lines. All of the claims belonging to relators are held by patents issued at various times up to and including November 2, 1892, when the patent to the Cuerpo Bazzo claim was issued. It will also be noted that some of the boundary lines of the Smoke Stack claim, as originally located, were laid upon

[11] Parts of the opinion are omitted.

[11a] The diagram is on the next page.

and over the surface included within the lines of the Mountain View and Fairmount, to the north. The patent to the former excludes the conflicting surface. It is admitted by the parties that all of the surface to the south and southwest of the Smoke Stack claim is cov-



ered by the patents of relators. The Copper Trust is an unpatented claim. It was located on April 30, 1899, by virtue of an alleged discovery made on that date in the small triangle, then vacant, which is indicated by the letters A, B, 10 feet in width at the base and extending east between the lines of the Johnstown and Mountain View to its apex, a distance of 75 feet. The only other ground embraced within the limits of the Copper Trust not covered by the relators' patents is a small triangle at the point C, between the east end line of the Mountain View and a claim known as the Sullivan, lying immediately to the east. It does not appear whether there is any apex within the exterior boundaries of the triangle last mentioned. The contention made by O'Connor was and is that the vein thus discovered in the first triangle mentioned dips to the south at an angle of about 70 degrees, and passes on its strike through the base of the triangle into the Smoke Stack claim, thence across its south side line into the St. Lawrence, and thence into the Anaconda claim across the west end line of the former at the point D, about 150 feet north of the intersection of this line with the east end line of the latter at the point G. The course of it, under this contention, is indicated approximately by the position of the letters B, A, E, D. O'Connor further contends that under the Copper Trust location he is entitled not only to the surface within his boundaries not covered by the relators' patents, but also to all portions of the lead having their

apex therein, as well as to those parts of it which, though they have no apex within his surface, are so situated with reference to the end lines of relators' claims that the relators may not assert title to them by virtue of their extralateral rights. In other words, it is asserted that the relators have no extralateral rights upon this vein, either through the Anaconda or the St. Lawrence, south of the intersection of the end lines of these claims at G, and within the triangular portion of the earth included between the vertical planes passing downward through these lines extended in their own direction indefinitely towards the south. He contends, therefore, that, inasmuch as the relators, in making their locations, did not so lay their lines with reference to the strike of the vein that they could follow it on its dip into this portion of the earth by virtue of their extralateral rights, they failed to appropriate it at all; that it was thus left to be appropriated by any other claimant; and that it belongs to the plaintiff under his location. The position of the relators is that, though they do not have title to the ores in the ground in question by virtue of extralateral rights through the St. Lawrence and the Anaconda, they nevertheless own them, as against O'Connor, at least, by virtue of their common-law rights to the surface and everything beneath, because neither O'Connor nor any one else owns any part of the apex of the vein, which is so situated that extralateral rights through such portion may be asserted to anything beneath the surface owned by them. Therefore, they say, O'Connor has shown no right to any part of the ores in controversy such as to authorize the court to grant an order permitting him to make the inspection and survey sought. Upon the facts presented, the court overruled the contention of the relators, and granted the order as prayed. Under it O'Connor was granted the right to enter into any or all the underground workings in all the claims mentioned belonging to the relators to the south and west of the Smoke Stack claim for the period of 40 days; to employ six engineers and assistants to conduct the work of survey and inspection; and to demand, at reasonable times, of the relators, that he and his said engineers and assistants be lowered into the mines and hoisted therefrom to the surface whenever he and they should require the same to be done. The relators, by a verified petition setting forth all the proceedings, including the pleadings in the cause, and all the evidence submitted by the parties, and alleging that O'Connor had not brought his action or made his application to the district court in good faith, applied to this court for relief, asking that this court issue a writ, under its constitutional powers of supervisory control over the inferior courts of the state, directing the district court and its judge to set aside and vacate the order, and to deny the application for an inspection and survey.

The theory of the relators is that upon the facts the district court

abused its discretion, and acted arbitrarily, and in plain violation of the legal rights of the relators, in granting the order, and that they are without redress by any other means known to the law. Under an order to show cause, issued by this court, the respondents appeared by filing an answer denying the charges of bad faith on the part of O'Connor, and also a motion to dismiss the application on several grounds. * * *

It appears that two, and only two, questions are presented for decision, namely: Was the action of the district court in granting the order erroneous? and can this court afford relief, and, if so, what is the proper remedy? We shall consider these in their order, and, incidentally, also the further question whether, if the order is found to have been erroneous, the circumstances present such a case as will justify this court in using any remedy which it may deem available.

Sections 1314 and 1315 of the Code of Civil Procedure, under which the order was made, provide:

"Sec. 1314. The court in which an action is pending for the recovery of real property or mining claims, or for damages for an injury, or to quiet title or to determine adverse claims thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter into or upon the property or mining claim, and make survey or measurement thereof, or of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands or mining claims belonging to parties to the action.

"Sec. 1315. The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter the property, with necessary surveyors and assistants, and make such survey and measurement; but if unnecessary damage be done to the property, he is liable therefor." * * *

We refer to the statute, and the cases in which the rule has been applied, to show that the district court had ample authority to make the order in question, provided the facts presented at the hearing justified it. Indeed, the order, upon proper showing, is always made almost as a matter of course. The purpose of the statute is to serve the interest of justice, however, and not to be made an instrument of injustice or oppression. Under it the court may not, without a reasonable showing, and in disregard of the rights of the party in possession of the property, or in control of the means of access to it, permit his adversary to enter upon it, merely because he desires and asks for an order permitting him to do so. The law must be administered in the spirit of liberality to accomplish the desired end. Purely technical and captious objections should not be tolerated. The language of the statute is, "for good cause shown," and, under the rule laid down in St. Louis Min. & Mill. Co. v. Montana Co.,

supra, whenever the order is made without good cause, it must follow that it is an infringement on the rights of the party in possession, and may be set aside as unauthorized; otherwise, the power of the court could be exercised without restraint, and to the great injury and oppression of the party in possession.

With these preliminary observations we proceed to determine, from a consideration of the facts presented to the district court, whether the order complained of was justified. O'Connor does not assert title to any other surface within the boundaries of the Copper Trust claim than the two triangles already mentioned. It is not controverted in this proceeding that the relators are entitled, under their patent, to so much of the vein found within the surface of the triangle A, B, as passes on its strike through the Smoke Stack, the St. Lawrence, and the Anaconda claims, and that in following this vein on its strike to the southwest O'Connor cannot pass beyond the east end line of the Smoke Stack. Indeed, this is apparent from an inspection of the plat. The parallelism of the end lines of the Smoke Stack and St. Lawrence also gives to the relators the right to follow the vein to the south on its dip beyond the vertical planes of the side lines of these claims. Under the Smoke Stack claim the extralateral rights are bounded by the vertical plane of the east end line of the Smoke Stack and St. Lawrence and a parallel vertical plane passing through the point at which the vein crosses the south line of the Smoke Stack into the St. Lawrence. The extralateral rights of the St. Lawrence are bounded by the vertical plane last mentioned and a vertical plane passing downward through the west end line of this claim, for it appears from an inspection of the plat that the area of the surface conflict between the Anaconda and the St. Lawrence belongs to the St. Lawrence claim. It follows, further, as a necessary conclusion, that, so far as O'Connor has any right to follow this vein on its dip from that portion of the apex found within the boundaries of the triangle A, B, this right is limited towards the west by the vertical plane of the east end line of the Smoke Stack and of the St. Lawrence, extended in its own direction. The situation presented by the position and course of the apex, with reference to the lines of these claims and the rights dependent thereon, has been considered and determined by the following cases: Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, 52 Am. St. Rep. 665; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 171 U. S. 50, 18 Sup. Ct. 895, 43 L. Ed. 72; Clark v. Fitzgerald, 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87; and Copper Co. v. Heinze, 25 Mont. —, 64 Pac. 326; and all questions arising thereon are now too well settled to admit of further discussion. It is of no moment to inquire what are the extralateral rights of the relators through the Anaconda claim. No part of the surface of that claim is embraced within the boundaries of the Copper Trust, and therefore we shall not stop to consider them, except to remark that, whatever

rights the relators have to follow the vein on its dip from the point where the apex passes into that claim, they cannot extend further east than the vertical plane of its east end line. Stated succinctly, the question to be determined is: What right, if any, has O'Connor, by virtue of the Copper Trust location, to assert title to the ores lying underneath the earth within the triangle the apex of which is at G? He does not contend that he has any right to follow the vein from the part of the apex within the triangle A, B, through the intervening space, about 1,300 feet, either on or beneath the surface of the St. Lawrence. As we have already stated, his claim is that, as no part of the ore bodies in controversy is situated within the surface boundaries of the St. Lawrence claim, no part of them belongs to that claim, and, as the relators may not claim this portion of the vein through the St. Lawrence or the Anaconda by means of their extralateral rights, they were not, in contemplation of the mining laws, appropriated by the relators through any of their locations, and therefore belong to O'Connor by appropriation under the Copper Trust, although he has no part of the apex by which he may follow the vein on its dip from the surface. In support of his contention, counsel for respondents cite the Del Monte Case, supra, as decisive. We do not so understand it. Among other questions decided in that case it was distinctly held that any of the lines of a junior location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location. The question presented here did not arise, and was not decided. Referring to the diagram used to illustrate the contentions of the parties and the different directions of the lines pointed out in the opinion, it appears that upon an extension of the vertical plane of the north end line of the New York claim in its own direction a triangular portion of the vein would be left between it and the vertical plane of the line bounding the extralateral rights of the Last Chance to the south, entirely beyond the vertical plane of the surface lines of any of the conflicting claims. The court says, with reference to the title to this portion of the vein: "In other words, referring to the first diagram, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line r, s, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line e, h, the end line of the New York claim, extended downward into the earth, will at a certain distance pass to the south of the line r, s, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, b, c, extended vertically into the earth, be-

longs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line a, d, t, and the line r, s, and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration." The court does say, as defendants claim, that the portion of the vein referred to does not pass to the owner of the New York. Obviously, this is a correct conclusion, for, under no circumstances, would the extralateral rights of the New York extend northward beyond the vertical plane of its north end line. With equal distinctness is the question of the rights of the Last Chance to any of that portion of the vein reserved. Nowhere in the opinion do we find any support for the contention that the junior locator acquires any right to any portion of a vein beneath the surface of the senior location by laying his lines upon, over, or across its surface, except that by this means he may secure parallelism of his end lines, and, through this parallelism, extralateral rights to the extent of the length of the vein found within the surface for which he may receive patent. We doubt seriously whether the court intended to be understood as declaring it to be the law that a junior locator may lay his lines, in part or wholly, upon and over the surface of claims already patented, and secure any rights thereby. After patent has issued, the legal title to the land conveyed by it has passed wholly from the government. The holder of this title is wholly beyond the jurisdiction of the land department; and it would seem that no one can initiate by trespass upon his tract any right whatever, whether it be committed ignorantly or not. It does not appear distinctly from the opinion in the Del Monte Case whether any of the claims were patented at the time the conflict arose. If the law is as counsel contend, then a patent does not convey an absolute estate, but only a qualified fee, and leaves the land still subject to some rights in the government,—a doctrine for which there seems to be no warrant in the statute.[12] So long as land is not patented,

[12] This statement overlooks the case where after a patent issues the apex of a vein which dips through the patented ground is so located as to give the locator that dip. The proper analogy in the law of real property to apply in the latter case, would seem to be that of powers to revoke and to new-appoint. See Costigan, Mining Law, 407. Once the right of the government to grant away to the subsequent locator of the apex the dip contained in the patented ground is conceded, the further proposition that such subsequent locator of the apex may make sure of the dip by laying the lines of his location over part of

the legal title is still in the government; and it may be argued with some force that, while held under a location merely, it is still within the jurisdiction of the land department, and for that reason it is within the province of its authority to say that a junior locator may lawfully go upon it, and mark his boundaries and erect his monuments upon its surface, in order to initiate rights in lands not covered by it. This seems to be the theory upon which the court proceeds in the Del Monte Case; for the argument upon which its conclusion on this point in the case is based is found on pages 73-85, 171 U. S., pages 902-907, 18 Sup. Ct., and pages 80-84, 43 L. Ed., and nowhere therein do we find any reason stated which would apply with any force to locations made by a trespass upon the surface of lands to which patent had already been issued.

The only authority called to our attention which distinctly sustains the contention of counsel as to the validity of the Copper Trust location is the decision in Re Hidee Gold-Min. Co., rendered by Secretary Hitchcock on January 30, 1901. In this decision the secretary distinctly sustains the contention of counsel for the defendants on this point. We quote from the headnote of his opinion: "The location lines of a lode-mining claim are used only to describe, define, and limit property rights in the claim, and may be laid within, upon, or across the surface of patented lode-mining claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins, where such lines (a) are established openly and peaceably, (b) do not embrace any larger area of surface, claimed and unclaimed, than the law permits." Even he limits the validity of such locations to cases where the lines are established openly and peaceably. We do not understand, however, how the United States government may convey any right to lands by consent of an adjoining owner under patent, which it could not convey without such consent. As we have said, we have grave doubts as to the soundness of the conclusion of Secretary Hitchcock. But conceding, for the present discussion, that it is the law, there is nothing in the Del Monte Case nor in the opinion of the secretary to support the contention of counsel that O'Connor acquired by his location of the Copper Trust ownership of any part of the vein in question which underlies the Rob Roy claim, or any of the claims to the south. In

an already patented surface would seem to be a logical consequence. If the government has reserved the right to revoke and new appoint as to the dips of veins which apex outside the patented land and has established the procedure of revoking and new appointing by means of locations authorized by it and if such locations to be effectual for the purpose must have parallel end lines, the right to authorize the locator to enter upon patented or unpatented land to make such end lines parallel exists as an essential part of the right to revoke and to new appoint.

the Del Monte Case the extralateral rights claimed by the Last Chance were asserted as to that portion of the vein the apex of which was found within that part of the surface of the Last Chance not covered by any previous location. The case goes only to the extent of deciding that, as the last chance had parallel end lines, and the vein passed through them, it had extralateral rights as to that portion of the apex not covered by either of the other conflicting locations. The Hidee Case involved only the validity of a location the lines of which were laid upon, over, and across the surface of the claims already patented, so as to secure all the rights appertaining to the unappropriated intervening surface. Certain expressions found in these cases in which reference is made to underground rights would seem to lend support to the contention of counsel, but, when they are considered in the light of the particular rights under discussion, they have no pertinency to the question presented in this case. The same may be said of Mining Co. v. Buck, 38 C. C. A. 278, 97 Fed. 462. Suppose, for instance, there had been no vacant surface within the boundaries of the Copper Trust location, would it be contended for a moment that O'Connor has any rights whatever under it? A discovery of a vein upon unoccupied land is absolutely essential to the validity of a location. There must be a surface right. Without this no right to the lode can be established. The statutes do not authorize the land department to convey a lode independently of the surface ground connected with and containing or overlying it. This is the conclusion stated by this court in Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 20 Mont. 337, 51 Pac. 159, in a case in which the plaintiff claimed under a patent which attempted to convey a small portion of surface covered by the Rarus location, together with 1,318 linear feet of the lode, which had its apex in, and underlay the surface of, the Johnstown, a conflicting claim. The patent was held to be unauthorized and void as to the portion of the ledge not underlying the surface conveyed by it. This court said: "It is no doubt true that those statutes, taken as a whole, give greater prominence verbally to the lode or vein than to the surface connected therewith; but this naturally results from the fact that the lode is the main subject treated. Such expressions and such prominence, however, cannot avail to permit the grant of lodes or veins embraced in a located quartz claim, regardless of the surface connected therewith." The same view is stated by Mr. Lindley in his work on Mines, in section 780. It is only by virtue of an apex found within the surface of any claim having parallel end lines than an owner may assert the right to enter beneath the surface of his neighbor. This is the evident meaning of section 2322 of the United States Statutes. Neither this section nor any other provisions of the statute authorizes or provides a way for the appropriation of any portion of a lode without some portion of the surface through which it may be reached. Should a patent issue to O'Connor, under the

Del Monte and Hidee Cases it would issue for the whole surface within the Copper Trust boundaries, excluding all those portions covered by the relators' patents. Under the principle of the case of Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., supra, and as stated by Mr. Lindley, this would ipso facto exclude the ore bodies lying within the disputed triangle. Again, the title to a mining claim carries with it all the rights incident to a title in fee at the common law, except in so far as it is enlarged or limited by the statute. This court, in Copper Co. v. Heinze, 25 Mont. 139, 64 Pac., at page 329, in considering such rights, said: "The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical plans of the side lines, is an expansion of the rights which would be conferred by a common-law grant. On the other hand, this grant is subject to the right of an adjoining locator to follow his vein upon its course downward beneath the surface included in the grant. In these two respects only do the rights conferred by the statute differ from those held under a common-law grant." Therefore, viewed merely as land with the ordinary incidents of ownership, the owner holds everything beneath the surface, subject only to the right of an adjoining locator or patentee, who has the apex of a vein, and who has complied with the statute, to pursue it on its dip beneath the surface. O'Connor has no part of the apex of the vein so situated with reference to the ore bodies within the triangle that he may pursue the vein from the surface. He cannot acquire any portion of the surface belonging to the relators. Neither can he pass through the St. Lawrence from the point at which he made his discovery, or from any point within any of the surface owned by him. He is therefore not in a position, by virtue of his location, to maintain his claim to the ores in controversy. Under the principle of Copper Co. v. Heinze, supra, and upon the undisputed facts presented upon this application, they belong prima facie to the relators, as owners of the Rob Roy claim, and others to the south by virtue of their common-law rights. See also, Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co. (decided May 27, 1901) 181 U. S. 885, 21 Sup. Ct. 885, 45 L. Ed. —. It thus appears that the order of the district court, based, as it was, upon a state of facts showing prima facie that O'Connor has and can have no interests in the property which he seeks to inspect, was not justified.[13]

This brings us to the consideration of the question, what remedy,

[13] For a statement of the "judicial apex" doctrine, see Costigan, Mining Law, 434–436, where the principal case is disapproved. In an article on "Lode Locations: A Specific Question of Extralateral Rights and a General Theory of Intralimital Rights," in 22 Haw. Law Rev. 266, Mr. Henry Newton Arnold approves of the principal case.

if any, may this court afford? * * * A writ will therefore issue, under the seal of this court, in the form of a peremptory order directing the district court and its judge to set aside the order made and entered on May 20, 1901. Nothing we have said in this opinion is to be construed as a final adjudication of the rights of the parties in the case of O'Connor against the relators. What we have said is upon the undisputed facts as they appear in *this record.* Writ granted.

WOODS v. HOLDEN ET AL.

1898. DEPARTMENT OF THE INTERIOR. 26 Land Dec. Dept. Int. 198.

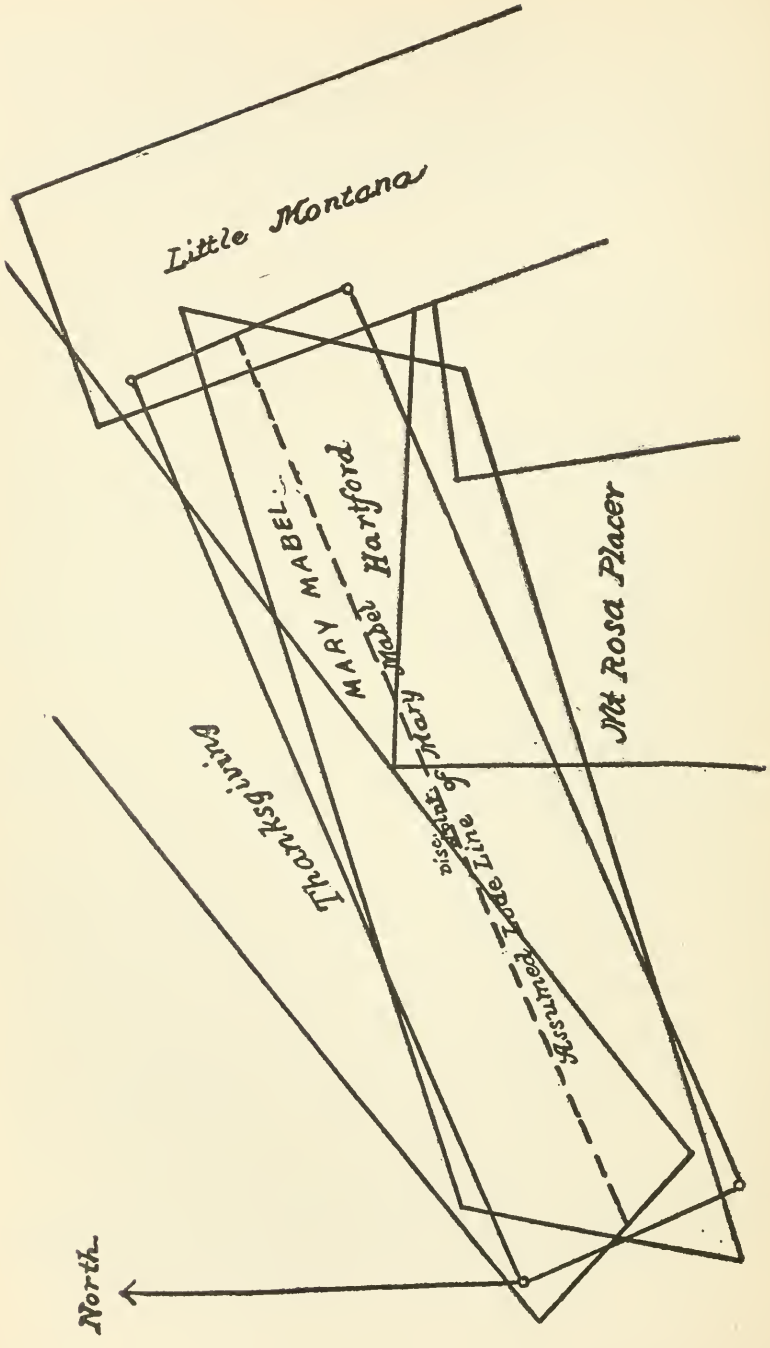
ACTING Secretary Ryan to the Commissioner of the General Land Office:

[After explaining that in an adverse suit between the Mary Mabel claim and the Hartford lode the conflict area was awarded to the Mary Mabel, but that when the Mary Mabel applied to purchase that area it was claimed that the Mt. Rosa patented placer intersected about 75 feet of the assumed lode line of the Mary Mabel, dividing the lode into two non-contiguous parts, and that in consequence the whole could not be patented since a "lode claim intersected by a prior placer location cannot be allowed to include ground not contiguous to that containing the discovery," the Acting Secretary continued:]

As will be seen by the accompanying plat, the ground in conflict between the Mary Mabel and the Hartford included much the larger part of both claims. The Mt. Rosa placer, which was patented April 24, 1893, nearly a year before the Mary Mabel was located, cut in two and segregated the assumed lode line of the latter.

Much evidence was taken at the hearing ordered by your office, to determine whether the Mary Mabel vein or lode is intersected by the patented placer. The local officers reached different conclusions upon this question; the register holding that the Mary Mabel vein or lode departs from its assumed course and passes to the north of the placer, and the receiver holding that the vein or lode does not depart from its assumed course, and that it is intersected by the placer. Your office adopted the conclusion of the receiver, and it is now insisted by the protestants that the concurring findings of the receiver and your office are supported by a preponderance of the evidence. It will be assumed that these concurring findings are right, and that the course of the vein or lode at its actual apex is intersected by the patented placer as shown upon the plat.

If this intersection of the Mary Mabel vein or lode affected the Hartford's right of possession to any part of the ground in conflict that claim should have been asserted in the proceeding and in the


Little Montana
Thanksgiving
MARY MABEL
Mabel Hartford
Mary
Assumed Apex Line
Mt Rosa Placer
North

tribunal where alone the right to possession can be determined in cases of conflicting mining locations.

The placer does not extend across the Mary Mabel location so as to divide it into two disconnected parts, but it does extend across and sever the actual apex of the lode. The Mary Mabel discovery is to the west of the placer, and the protestants urge that the Mary Mabel vein is divided into two non-contiguous parts, that the location cannot lawfully include any part of the vein not contiguous to the discovery, and that the right of the Mary Mabel cannot extend easterly beyond the point where its lode mine is intersected by the westerly line of the placer.

Section 2320, Rev. Stat., in prescribing the extent of a lode location, says:

A mining claim * * * may equal but shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface. * * * The end lines of each claim shall be parallel to each other.

Section 2322, Rev. Stat., defines the rights under a lode location as follows:

The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.

The undisputed evidence shows that the Mary Mabel vein dips to the north, that only the apex and a small portion of the vein upon its dip is located within the placer and that in dipping to the north the vein passes into that portion of the Mary Mabel location lying between the northerly side line thereof and the placer. Along its course from west to east the vein has an actual existence within the Mary Mabel from one end line to the other, so that the location of that claim does not involve or present a violation of the statutory requirement that a lode mining claim shall be located "along the vein." The vein, after dipping out of the Mt. Rosa placer, is either lawfully included in the Mary Mabel claim, or a valid location thereof cannot be made. This latter part of this alternative proposition cannot be recognized because it has no support in any statute and is inconsistent with the express provision of section 2319, Rev. Stat., which declares:

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase.

There is no claim that the existence of this lode was known at the time of the Mt. Rosa placer entry or patent, and therefore the portion thereof within the placer passed to the placer claimants under the provision of section 2333, which reads: "But where the existence of the vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

It has been indisputably settled, and is admitted by protestants, that a placer claimant cannot follow a vein or lode beyond the surface boundaries of his claim extended vertically downward. The portion of this vein lying outside of the placer is "in lands belonging to the United States," and under section 2319 is "free and open to exploration and purchase." While the actual apex of the vein is within the placer, the United States has dealt with and disposed of the placer claim as non-lode ground, and for all purposes of disposition by the United States under future exploration and discovery any vein or lode in adjacent ground stops at the point of its intersection with the boundary of the placer. Within the placer it is not subject to exploration or purchase, except according to the will of the private owner. For the purposes of discovery and purchase under the mining laws, the legal apex of a vein like the Mary Mabel, dipping out of the ground disposed of under the placer or non-mineral laws, is that portion of the vein within the public lands which would constitute its actual apex if the vein had no actual existence in the ground so disposed of. Under this view the apex of the vein extends throughout the entire length of the Mary Mabel claim, if that be necessary to the valid entry thereof. Protestant's contention that the Mary Mabel vein or lode is segregated and divided into two non-contiguous parts by the Mt. Rosa placer and that the location and entry of the easterly part is thereby rendered invalid cannot be sustained.

The Mt. Rosa being patented ground constituted no part of the Mary Mabel location and was excluded from the entry thereof, so that the westerly and northerly lines of the placer, where they come in contact with the Mary Mabel, became a part of the southerly side line thereof. Under this adjustment the two side lines are not parallel, but it is not necessary that they should be. The provision upon that subject is by its own terms confined to end lines. No portion of either side line as thus constituted is more than 150 feet from the middle of the vein, and protestant's assertion of an infraction of the Colorado statute limiting the width of lode claims to 150 feet on each side is not supported by the record.

Your office decision herein is reversed and—

(1) The Mary Mabel entry is hereby sustained except as to the areas in conflict with the Sierra Nevada and the Little Montana.

(2) The entry of the area in conflict with the Sierra Nevada is hereby canceled, subject to the right of the Mary Mabel to enter that area, without giving further notice, should the controversy be adjudicated by a court of competent jurisdiction in favor of the Mary Mabel or the adverse claim of the Sierra Nevada be waived, but unless proceedings to accomplish such adjudication are prosecuted with reasonable diligence the right to make entry of this area will be lost.

(3) The entry of the portion of the area in conflict with the Little Montana is hereby canceled subject to the right of the Mary Mabel, within a reasonable time, to complete its application for patent to this area by giving notices thereof and otherwise complying with the law, and mining regulations, and,

(4) If, by reason of the cancellation hereby made there remains in the Mary Mabel entry any non-contiguous area in the easterly portion thereof, your office will make such cancellation or disposition of such non-contiguous ground as may be proper. This direction is made necessary because there is in the record no plat showing the Sierra Nevada conflict.[14]

WATERLOO MIN. CO. v. DOE ET AL.

1897. CIRCUIT COURT OF APPEALS. 27 C. C. A. 50, 82 Fed. 45.

APPEAL from the Circuit Court of the United States for the Southern District of California.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

KNOWLES, District Judge.[15]—This is an action brought by John S. Doe to restrain and enjoin the appellant from committing a continuing trespass upon two mining claims, known as the "Oriental No. 2" and the "Red Cloud," situate in Calico mining district, San Bernardino county, Cal. John S. Doe died, and the appellees, Bartlett Doe and Charles F. Doe, were appointed executors of his last will and testament, and were substituted as parties plaintiff in the place of the said John S. Doe. The appellant, the Waterloo Mining Company, owns the Silver King mining claim. This lies north of and adjoining the said Oriental No. 2 and Red Cloud claims. The appellant sunk a shaft or incline upon its own surface ground within the lines of its claim, and from thence drifted into the ground claimed by appellees, and which ground is beneath the surface of that

[14] See Iron Silver Min. Co. v. Murphy, 3 Fed. 368, 376, quoted in note to Van Zandt v. Argentine M. Co. ante. On the "theoretical apex" doctrine, see Costigan, Mining Law, 450.

[15] Parts of the opinion are omitted.

which is within the line of appellees' claims. This the appellant claims the right to do, and threatens and undoubtedly intends to continue to do, and to extract the ore therein and appropriate the same to its own use. There is a vein of spar, carrying silver and other minerals, in the Silver King lode claim, called the "north vein," and another sometimes called a "divergent vein," and at other times the "middle vein." There is a vein of spar, also carrying silver, which crops out on the Red Cloud and Oriental No. 2, and which in the evidence is termed the "south vein." Appellant claims that all these veins belong to a mineralized zone whose apex is in the Silver King ground. The Silver King is higher up the mountain than the Red Cloud and Oriental No. 2 claims, and hence upon a higher elevation than the other two. If the ground embracing these three veins is one mineral zone, then the part thereof within the Silver King premises would have the higher elevation. This zone would, however, be cut by the south side line of the Silver King and the north side lines of the Red Cloud and Oriental No. 2. Appellant received pending this suit a patent from the United States to the Silver King lode. The appellees have certificates of sale from the United States for their two claims. * * *

Counsel for appellees urge that whatever the court might find as to the south vein being a part of a mineralized zone having its apex in the Silver King lode, the premises of appellant, still appellant would have no right to follow such lode on its downward course outside the side lines of said Silver King lode, because the location of the same was not made according to law, in this: that its end lines were not located parallel with each other. It has been observed that the appellant has a patent from the United States for its said lode. Its rights must be determined by the terms of this patent. The description in the patent of the Silver King lode gives it parallel end lines, and grants the right to follow all lodes on their dip outside of the side lines of the same, whose apex is within the surface lines of the claim, and whose strike is cut by the end lines of the claim extended perpendicularly downward. * * *

The presumptions are in favor of the correctness of the land department in issuing this patent. Its action was within its jurisdiction, and we cannot go behind the same in a collateral action. Looking, then, at the patent, we observe that appellant was granted extralateral rights. If, then, appellant, in entering the premises embraced within the lines of appellees' claim, beneath the surface, followed down on its dip a lode whose apex was within its ground, and whose strike was cut by the end lines of its claim as patented, it was pursuing a course to which it had a legal right. * * *

The main issue, upon the evidence, is as to whether what is called by the witnesses the "south vein" is a part of a mineralized zone, which may be denominated a "lode," and which has its apex in the Silver King ground, or is a separate vein or lode, having is apex in

the Oriental No. 2 and Red Cloud mining claims. If it should be determined that this south vein is no part of a lode having its apex in said Silver King claim, then the difficult question that may be presented if the court should find otherwise is not involved. This question is as to what would be the rights of the parties if it was found that the south and north veins were part of one lode, as the said lode would be cut by the south side line of the Silver King lode and the north side line of the Oriental No. 2 and the Red Cloud claims. * * *

We hold, therefore, that what has been termed the "south vein" is no part of the Silver King lode, but a separate and distinct lode, meeting the usual definition of a "lode" or "vein"; that is, an aggregation of mineral matter containing ores in fissures of rocks. So far as this vein lies within the boundaries of Oriental No. 2 and the Red Cloud mining claims, it belonged to the appellees (the plaintiffs in the court below), and the appellant had no right to enter upon the same.

The appellant presents another question for consideration. It is claimed that, admitting that the south vein is no part of the Silver King lode, still appellant should not be enjoined from entering upon the same, for the reason, as it is urged, that the end lines of the Silver King cut this vein. It would appear from the evidence that this south vein on its eastern strike does enter the Silver King ground, and passes out of its east end line. The apex of this vein is not shown to be in the ground at this point, but it is a fair presumption that it is, from its course and dip. The said vein, on its westerly strike beneath the surface, until it passes the westerly end line of the Silver King claim, is within the Oriental No. 2 and Red Cloud claims. The cropping of the apex of this vein, however, on the Red Cloud premises, has a course towards the south side of the Silver King lode. In fact, there are some croppings cut by this south side line that are supposed to belong to this vein. This is not, however, fully established. The evidence is not sufficient to show that the apex of this vein is found anywhere within the Silver King premises opposite to the Red Cloud lode. The burden of proving this was upon the appellant, as the vein in this locality beneath the surface of the Silver King is nowhere found. If the vein in its course from east to west should be found, along on its apex, to pass out of the Silver King lode and into the Oriental No. 2 ground, from this into the Red Cloud ground, and then back again into the Silver King premises, and westerly out of its west end line, there certainly could be no right in appellant to any part of the vein, the apex of which was not in the Silver King premises. The grant is to lodes having their apex in the ground patented. The fact that a part of the apex might be in the ground granted would not give any right to that part of the apex which is not therein, although the apex might be cut by both end lines of the granted premises. There is no case that

supports this doctrine. * * * The only question that could arise, if the facts were as appellant claims, is whether it could follow down on the lode from that part of the apex thereof in its premises into the premises of appellees. This is a disputed question in mining litigation. As I have stated, however, the evidence does not warrant the court in saying that there is any part of the apex of the south vein in the Silver King premises opposite the Red Cloud claim. As to what would be the right of appellant in the Oriental No. 2 premises, if the south vein, after it passes on its strike into the Silver King ground, on its dip entered the Oriental claim, we do not decide. The case is not argued and presented to us upon that state of facts. It does not appear that, from the point where the apex of the south vein going east may cross the south side line of the Silver King claim, the appellant has entered the Oriental No. 2 premises on the dip of the same. We have nothing presented, then, upon which to base a decision. The decree of the court below is therefore affirmed.

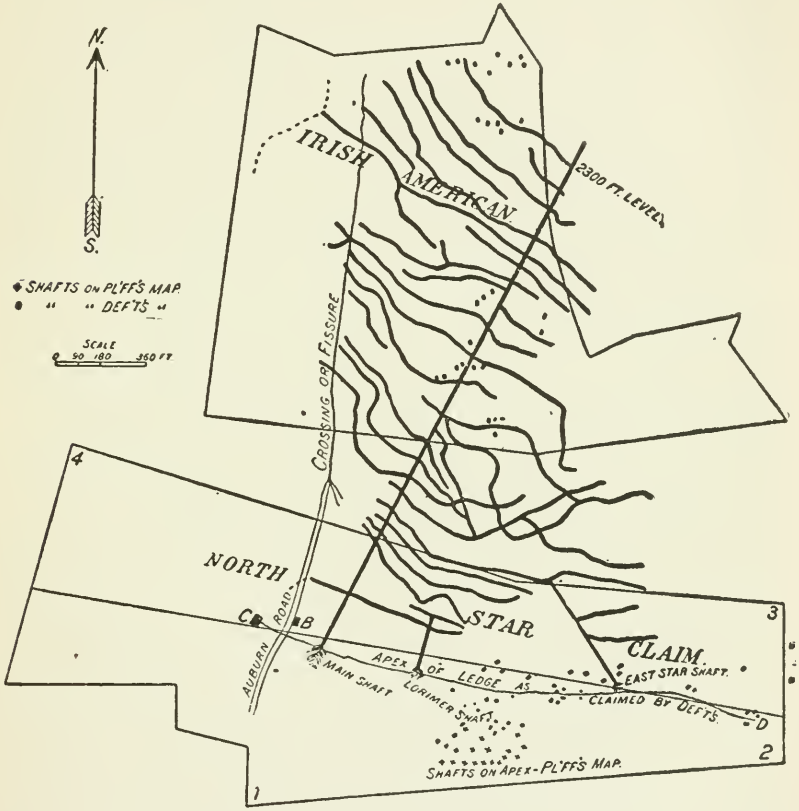
CARSON CITY GOLD & SILVER MIN. CO. v. NORTH STAR MIN. CO.

1896. Circuit Court, N. D. California. 73 Fed. 597.

Beatty, District Judge.[16]—This is an action of trespass brought by the plaintiff, as owner of the Irish-American mining claim, situated in Nevada county, Cal., against the defendant, which, as owner of the North Star claim, has followed and worked its ledge, upon its descent, under the surface of the former claim. Each claim is a consolidation of a number of small claims, many, if not all, of which were located long prior to the enactment of any mining law by congress, and is patented in the irregular shape and of the unusual size represented upon the following plat; the Irish-American being about 1,500 feet square, with a strip extending from the main body about 600 feet east, and the North Star, lying 300 to 400 feet south, is about 3,100 feet along from east to west and 650 to 1,250 wide. The plaintiff's theory is that the apex of the North Star ledge runs so near northwesterly and southeasterly that, if continued in its course, it would cross the side lines, 1, 2, and 3, 4, of the claim; but that the ledge, in its northwesterly course, before reaching the north side line, is interrupted by a nearly perpendicular north and south fissure, or, at least, a distinct line of change in the geological formation of the country, called, in this case, a "crossing," to the west of which the ledge does not appear either upon the surface or in the underground workings. The defendant claims that the apex of its ledge

[16] Parts of the opinion are omitted.

runs in an easterly and westerly direction from end to end, and along the center of its North Star claim, and that its dip is northerly, or practically in the direction of its main working shaft, and, while admitting the existence of the crossing, affirms that the ledge continues to the west of it. The surface of the claim is so covered with soil, and any outcroppings of a ledge that ever may have



existed are so obliterated by past mining operations, that very little can now be determined, by surface indications, of the course of the ledge. Perplexity is added from the fact that, over much of the surface, there are many old mining shafts and workings, in which more or less ore has been found, and which are in such relative positions that they are no guide to the location of the course of any ledge. A portion of them are represented on the plat by dots and crosses.

1. During the trial plaintiff objected to defendant's evidence,

based upon the North Star claim as patented, and insisted that the claims of which it is composed should be shown as originally located, and that the rights of the parties should be governed by the located lines of those claims, and not by the patented lines of the North Star. This objection was overruled, and as, upon final argument, plaintiff insisted upon its objection, a brief consideration of it will precede any discussion of the other issues. In this objection are involved the questions of the parallelism, and of the intersection by the ledge, of the end lines of the original locations. When those locations were made, there was no law requiring such parallelism, but, independent of all lines, the right to follow the ledge along its course for the full distance claimed, and underground upon its true dip, to any depth, was undisputed. Although section 9 of the act of 1872, in repealing certain parts of the old law, provided that "such repeal shall not affect existing rights," the courts have held that, when any claim is patented, those rights are controlled by the patented lines. * * *

Without now defining what questions are settled by the issuance of a patent, it is held that the question of the defendant's right to a patent to the North Star, with the boundaries as defined by it, was within the jurisdiction of the department, and was determined by it, from which it is held to follow that the boundary lines, as defined by the patent, are the only lines by which the rights of the parties can be determined. To adjudge such rights by the original lines of the several claims of which the North Star is composed would be such an assault upon the patent as cannot be sustained. The former ruling upon plaintiff's objection is therefore adhered to.

2. Without making special reference to the testimony of the several witnesses as to the location and course of the apex, it may be concluded, as clearly established, that a ledge had been found in a number of the group of old shafts existing near the south side line of the North Star. Upon one of the plaintiff's maps is indicated a line of shafts running east and west, which is marked "Shafts on Apex." Plaintiff's witness Hugunin was on the ground the day this ledge was discovered, in 1851, and located a claim running west from the main shaft, and he fixed a point, designated "B" on the plat, being over 100 feet westerly from the mouth of the main shaft, as within his claim, and as the most westerly cropping of the ledge. He also located the apex of the ledge 50 feet south from the mouth of the Larimer shaft, and 40 to 50 feet south of the old powder house, which was on a direct line connecting the mouths of the main and Larimer shafts. An apex running through these three points fixed by this witness, and continued in its own direction each way, would cross the south side and west end line of the North Star, and the same result would follow to pass a line through these points and the group of shafts. I do not think that, from a fair consideration of all the plaintiff's evidence, it can be concluded that the course of the ledge is across both the side lines. On the contrary, defendant's wit-

nesses locate the apex easterly and westerly near the center line of the claim as indicated upon the plat, and the witness Morse located croppings at the point designated "C," being about 300 feet west from the mouth of the main shaft, and he says that he and his associates located 10 claims, running west from the Auburn road, "as near as we could tell, on the line of the ledge." Defendant's witnesses are corroborated by other established facts: (a) Before the surface was disturbed, and when indications of the ledge were clearer, the original locations were made upon an east and west line, and about along the central line of the North Star. (b) The workings of a mine, made in mining operations, and not in support of litigation, are generally important as evidence of any facts which may be legitimately inferred from them. The three incline working shafts were started upon this North Star central line, and are all shown to follow the ledge in their descent. It is reasonable to presume they were started upon or near the apex of the ledge. (c) The working levels in this case are not so conclusive as usual of the course of the ledge for the reason that there are large "horses" in the mine, to the upper and lower surface of which the workings have conformed, which largely accounts for the varying directions the levels have taken.

A majority, or many, of the upper levels are nearly parallel with the north side line, while others, if prolonged, would cut the west end and south side lines, and still others would cross both side lines, and especially those in the deeper workings. But, as ledges may, in their depths, change their course, and as the surface course or the course of the apex is to govern the miners' rights, the workings nearest the surface are better guides to the course of the apex than those far below.

Plaintiff admits that there is a mineral vein along the line claimed by defendant as the apex, but says it is but a spur or seam from the ledge, which runs elsewhere; its exact locality not being fixed. That this is but a spur or seam of a ledge, and so unimportant that it cannot be made the basis of a mineral location, cannot be reasonably concluded, when it is remembered that the first locations were made upon and along it. Moreover, the law fixes no limit to the size or prominence of a mineral-bearing vein before a mining location can be made upon it. While, in the group of shafts referred to, a ledge was found, its apex, or the course of the apex, has not been located, unless it be by the plaintiff's testimony concerning the "shafts on apex", before named; and it has not been shown that any vein crosses, or is found beyond, the south side line. It is not impossible that the apex of whatever vein exists at this place, if traced out, would assume a course somewhat corresponding to the outline of the group of shafts, and running in a northeasterly and a northwesterly direction until it unites with the other line of apex, and that the two outcrops or ledges are but parts of one vein, which are separated

by a large "horse," which defendant's evidence and diagrams show exists near the surface of the mine. There is some evidence, at least, to show that two veins do unite in the workings not far below the surface.

From a full consideration of all the evidence it is concluded that the first mining locations were located along the central line of the North Star claim; that such line is practically the line of the apex of the ledge in controversy; that it has been fixed at different points along the irregular lines indicated upon the plat between the letters "C" and "D" and running in a direction south about 80 degrees east.

3. Generally, when a ledge has been traced for such a distance, in a claim of this size, it would not be an unreasonable presumption that it would continue in the same direction far enough to cross the end lines of the claim. This presumption may be indulged as to the east end line, but, as before stated, plaintiff asserts that it does not, either on the surface or underground, pass west of the "crossing," which contention is sustained by its testimony, while that of defendant is to the contrary. Underground there may be some indications of a ledge west of the crossing; but little, if any, ore has been found there, and the workings of the mine, with some unimportant exceptions, sustain plaintiff's contention. Upon the surface there is nothing shown by which to definitely locate the line of this crossing. Conceding, however, that the ledge intersects the east end line, from whence it extends no further than about 2,200 feet westerly, to the point "C," fixed by the witness Morse as the place where he found the croppings of the ledge, what are defendant's underground rights? That the end lines are not parallel cannot be the basis of an objection, because their convergence, when extended in the direction of the dip of the vein, would give defendant less, instead of more, than the law provides for.

Attention has not been called to any precedent in which a ledge is abruptly terminated in its onward course, as is claimed occurs in this case; but a similar principle is involved when a ledge, passing through an end line, is terminated, as to the claim, by going through and out of it across a side line. Under such circumstances, it has been held that the ledge may be followed, on its descent, between the perpendicular plane drawn through such intersected end line and another similar parallel plane passing through the point where the ledge crosses the side line. * * *

It is therefore concluded that the defendant may follow its ledge on its descent under the Irish-American claim, and to any depth, between a perpendicular plane drawn through the east end line of its claim and another similar parallel plane crossing such claim at the point fixed as the western terminus of the ledge, being designated by "C," and westerly from the east end line 2,200 feet, measured along the straight central line upon the plat, and along the like line upon defendant's Exhibit 8: provided, that defendant shall in no

event pursue its ledge west of a perpendicular plane extended through the west end line of its claim; and judgment for defendant is ordered accordingly.

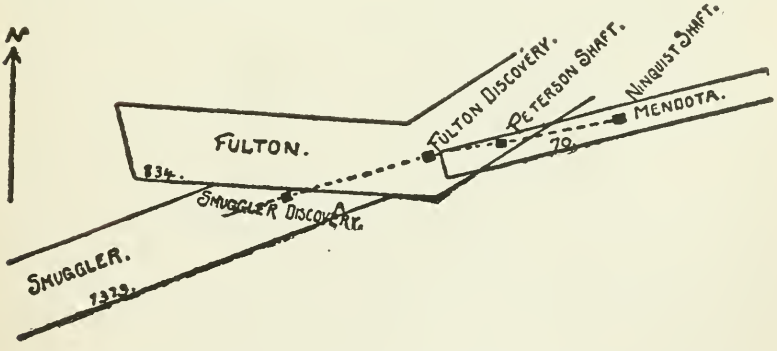
There was another question suggested, but, as it was based upon the theory that the course of the ledge was such as would carry it across the side lines, which I cannot adopt, it will be unnecessary to consider it.

CATRON v. OLD ET AL.

1897. SUPREME COURT OF COLORADO. 23 Colo. 433, 48 Pac. 687.

ACTION by Benjamin C. Catron against Robert O. Old and Ellen Old for possession of, and damages to, real property. The trial in the court below resulted in a verdict and judgment for defendants. Plaintiff appeals. Reversed.

HAYT, C. J.—Upon the facts which are conceded, a single question of law is raised. The point in controversy may be clearly understood from the map and diagram on the next page. The plaintiff is the owner of the Smuggler mining claim, survey lot No. 7,373. Defendants are the owners of the Fulton and Mendota mining claims, survey lots Nos. 70 and 834. All the claims are patented, and there is no question of surface rights. The dotted line on the map shows the apex of the vein through the claims. This vein, which has been explored extensively in workings upon both the Mendota and Fulton claims, dips to the south beneath the surface of the Smuggler claim. In following the vein upon its dip, the defendants passed beyond the side line of the Fulton claim, and are working beneath the surface boundaries of the Smuggler claim at a point marked "A" upon the map.



The question presented is as to whether the vein at A belongs to the owners of the Fulton, or to the plaintiff, by reason of his owner-

ship of the Smuggler claim. The plaintiff's right is based upon his ownership of the surface, upon the common-law principle that the owner of the surface owns all above and all beneath. The defendants claim by reason of the apex of the vein being within their surface boundaries. It is claimed that the common-law doctrine is changed by section 2322 of the Revised Statutes of the United States, which provides, inter alia, that the owners of the surface shall be entitled to all veins, lodes, or ledges, throughout their entire depth, where the top or apex of such vein lies within the surface lines of the claim extended vertically downward, although such veins, lodes, or ledges may, in their downward course, so far depart from a perpendicular as to extend outside the side lines of such surface location; such lateral rights to be confined to such portions as lie between vertical planes drawn downward through the end lines of the location. The question is thus sharply defined: The plaintiff claims that, by reason of the strike of the vein in the Fulton location, the defendants have no extralateral rights whatever, while the defendants claim that they have such rights, and are by reason thereof entitled to the vein in its downward course through the Smuggler territory. Questions upon the law of the apex under the United States statutes are receiving much attention from the mining communities and from the courts. At one time it was quite generally conceded that the owner of the apex might follow the vein upon its dip under all circumstances, but decisions of the supreme court of the United States in recent years have been contrary to such generally accepted doctrine. In Mining Co. v. Tarbet, 98 U. S. 463, it was held that a location laid across a vein, so that its greatest length crosses the same instead of following the course, would secure only so much of the vein as it actually crosses at the surface. In speaking of the right to follow veins upon the dip, the court said, in reference to the intent of the statute: "We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode and extend perpendicularly downward, and to be continued in their own direction either way horizontally, and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law." After this decision was rendered, it was still thought that the owner of the apex had a right to follow the vein on its dip beyond the side lines, although the vein crossed both side lines, and

although the end lines were to be treated as side lines and the side lines as end lines. The question again came before the supreme court in the case of Iron-Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, which was a contest between the owners of the Stone claim, located in the shape of a horseshoe, and an adjoining claim; and it was held that as the end lines of the Stone claim, as located upon the surface, were not parallel, the owners had no extralateral rights, and were not permitted to follow the lode in its downward course beyond the side lines of the claim. The question next came before that court in the case of Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, where it was again held that when the claim upon the surface crosses the vein, instead of being along the same as provided by statute, the end lines of the claim became the side lines and the side lines became the end lines, and that the apex rights must be determined accordingly. Notwithstanding the vein, in its strike across the country, passed across the side lines, instead of running parallel with them, the opinion had become so firmly fixed that these decisions did not entirely overthrow it; but in the subsequent case of King v. Amy & Silversmith Consol. Min. Co., 152 U. S. 222, 14 Sup. Ct. 510, the language of the court left no ground for dispute. In that case it was first definitely and authoritatively determined that when a vein crossed both side lines of a claim, instead of running in a direction parallel thereto, the owner of the surface had no apex rights that would allow him to follow the vein in its dip beyond a vertical plane drawn downward from the surface boundaries of the claim. This last decision was followed in the more recent case of Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733. Therefore it may now be said that the rule is well established, in cases other than horizontal veins, that if the vein, in its strike across the country, is parallel to the side lines of a claim, the owner of the apex has the right to follow the vein to any depth in its dip beneath the surface, although in so doing he passes beyond the side lines of his claim into adjoining territory; and it is equally well settled that, when the strike of the vein is across the side lines of a claim, no extraterritorial rights are acquired by reason of the ownership of the apex.[16a] But there are other important questions of the law of the apex which have not at this writing been passed upon by the supreme court of the United States. In the case just cited it is said, as to one of such questions, "There has been no decision as to what extralateral rights exist if a vein enters at an end, and passes out at a side, line." And it may be added that in no case has that court directly decided the question before us in the case at bar, where the vein, upon its strike, enters the claim by crossing one side line, and leaves the claim at the same side.

It is claimed by appellant that the facts in this case are so nearly

[16a] See note 7, ante.

similar to the facts in the case of King v. Amy & Silversmith Consol. Min. Co., supra, that the decision in that case against the right of the apex owner is controlling here. There is, however, a marked difference between the two cases, as will be seen by a comparison of the diagram in this case with the one to be found in the opinion in that case. Perhaps the case at bar more closely resembles the claim set up by the owners of the Stone claim, and passed upon in the case of Iron-Silver Min. Co. v. Elgin Mining & Smelting Co., supra; the Stone claim being located in the shape of a horseshoe, and the location in this case being similar, although the ends of appellees' claim are at a greater distance apart, the claim being in the form of an obtuse angle. The latest expressions of the United States supreme court upon the subject seem to indicate that the location upon the surface must substantially cover the vein, although a somewhat different construction has been put upon these cases by some of the circuit courts of the United States, and by the circuit court of appeals of the Ninth circuit. In the case of Last Chance Min. Co. v. Tyler Min. Co., 9 C. C. A. 613, 61 Fed. 557, the comparative direction of the vein was thought by the court to be controlling, and in that case it was said to be a question of fact as to whether or not the vein extended more along than across the claim. The doctrine of Last Chance Min. Co. v. Tyler Min. Co. was followed in the case of Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., 63 Fed. 540, the opinion in both cases having been written by the same judge. In the latter case it is said: "One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines, as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute." In both cases the learned judge proceeds upon the doctrine of comparative direction of the lode, and it was left to the jury, as a question of fact, whether or not the vein extends more along than across the claim. The obvious objection to this doctrine is that it introduces a feature of uncertainty into mining titles, which should be avoided if possible. Moreover, it is in irreconcilable conflict with the decision of the supreme court of the United States in the Amy & Silversmith Case, supra. An examination of the plat accompanying and made a part of that decision shows that the court denied extralateral rights to a

vein which in fact runs "more along than across" the location upon the surface. In the case of Montana Co. v. Clark, 42 Fed. 626, it was held that, where a claim is in the form of an isosceles triangle, the owner cannot follow the lode or vein upon the dip through the side lines of the claim into another claim. This case followed the Iron-Silver Min. Co. v. Elgin Mining & Smelting Co. case, supra, and proceeded upon the theory that, to the exercise of the right to follow the vein upon its dip, the end lines must be parallel. With the exception of the Wyoming-Champion Case, these cases were all decided before the decision of the Amy & Silversmith Case, supra, was announced, which case, as we have stated, contains the first direct and positive declaration upon the subject by the supreme court of the United States. There has been one decision rendered upon the question since by the district judge of this district. In Del Monte Mining & Milling Co. v. New York & L. C. Min. Co., 66 Fed. 212, a question was presented as to apex rights between the New York claim and the Del Monte claim; the New York being higher up the mountain than the Del Monte, and holding the apex. Explorations had disclosed that the New York vein, in its general course, had within its side lines the apex, for a distance of 1,070 feet. As the vein entered one end line of the New York claim, the only difficulty found by the district judge grew out of the fact that it departed from the side lines of the claim about 280 feet from the end line opposite the place of entrance; the claim being less than the full length allowed by statute. In these circumstances, upon a preliminary application, the learned district judge held that the owners of the New York were entitled, by reason of their apex rights, to follow the vein in its downward course, through the side lines of the claim, and beneath the surface boundaries of the Del Monte location. While there are some expressions in the opinion which would seem to be in favor of the contention of appellees in this case, if the facts are not considered, yet when it is remembered that the vein entered one end line of the New York claim, and extended more than 1,000 feet in a general direction parallel to the side lines of the claim, it would seem that the decision is hardly in point in this case. In the recent case of Mining, etc., Co. v. Turner, 23 Colo. 400, 48 Pac. 685, this court held that where a vein passed through an end line of a claim, and extended, as far as disclosed (this being for a considerable distance), in a general direction parallel to the side lines of the location, the lower court was justified in giving the claim extralateral rights, there being no evidence to show that the vein departed from the side lines of the location at any point, the presumption being that the vein continued regularly upon its course. In the case at bar no part of the Fulton vein runs parallel, or nearly parallel, with the side lines of that claim, as staked upon the surface. The United States supreme court has said that if the locator of a mining claim mistakes the direction

of his vein, and locates accordingly, the courts have no power to make a new location for him, but must determine his rights with reference to the location actually made. King v. Amy & Silversmith Consol. Min. Co., supra. Developments made subsequent to the location of the Fulton disclose that the claim, as located, contains very little of the apex of the vein, and such as it does contain does not cross either end line, and does not run parallel, or nearly parallel, to the side lines; so that in no aspect of the law can the Fulton be allowed extralateral rights by reason of the apex of the vein. The judgment of the district court must accordingly be reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.

LAWSON v. UNITED STATES MINING COMPANY.

1907. Supreme Court of the United States.
207 U. S. 1, 52. L. ed. 65, 28 Sup. Ct. 15.

On writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

This suit was commenced in the circuit court of the United States for the district of Utah by the United States Mining Company, claiming to be the owner of certain mining property, and praying that its title thereto be quieted and the defendant restrained from taking any ore therefrom. * * * On the hearing the court * * * entered a decree dismissing the plaintiff's bill. From this decree the plaintiff appealed to the circuit court of appeals (67 C. C. A. 587, 134 Fed. 769), which reversed the decree of dismissal, and remanded the case with instructions to enter a decree for the plaintiff in conformity with the prayer of the bill. Thereupon, on application of the defendants, the case was brought to this court on certiorari.

Mr. Justice Brewer delivered the opinion of the court:[17] * * *

Coming now to the merits, it is not open to dispute that the defendants were taking ore from beneath the surface of the plaintiff's four claims. The question therefore arises, What right had they to thus mine and remove ore? They must show that the ore was taken from a vein belonging to them. Was there a vein? Where was its apex, and who was the owner of that apex? The testimony is voluminous, and even with the accompanying diagrams it is difficult to come to a satisfactory conclusion as to the facts. * * *

From the opinion of the court of appeals it appears that it found that there was a broad vein. It says: "A careful examination and consideration of the evidence clearly convinces us that the stratum of limestone constitutes a single broad vein or lode of mineral-bearing

[17] Parts of the statement of facts and of the opinion are omitted.

rock extending from the quartzite on one side to the quartzite on the other." This stratum of limestone underlies the four claims of the plaintiff, and one of the contentions of the defendants is that there are several independent veins, one of which has its apex within the surface lines of the Kempton and another its apex in the Ashland, that these independent veins continue down through the stratum of limestone beneath the surface of the plaintiff's claims, and that it was only from these independent veins that the defendants were mining and removing ore. Of course, this difference between the conclusions of the court and the contentions of the defendants affects materially the scope of the inquiry. If the limestone is not, strictly speaking, a vein, but a mere stratum of rock through which run several independent veins, then the inquiry must extend to the location of the apex of each separate vein; whereas, if the stratum of limestone is itself a single broad vein, then the inquiry is narrowed to the location of its apex.

With reference to the conclusion of the court of appeals it is sufficient to say that if the testimony does not show that it is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong.

Treating this limestone as a single broad vein, it is apparent that the entire apex is not within the surface of either the Kempton and Ashland, but that it is also found in the Old Jordan and Mountain Gem,—the properties of the plaintiff. The line which divides the surface of the claims of the defendants from the Old Jordan and Mountain Gem claims also bisects the vein as it comes to the surface. In other words, part of the apex is within plaintiff's claims and part within defendants'. In such a case the senior location takes the entire width of the vein on its dip. This was the conclusion of the court of appeals, as shown by this quotation from its opinion (p. 592):

"Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines. This is so because it has been the custom among miners, since before the enactment of the mining laws, to regard and treat the vein as a unit and indivisible, in point of width, as respects the right to pursue it extralaterally beneath the surface; because usually the width of the vein is so irregular, and its strike and dip depart so far from right lines, that it is altogether impracticable, if not impossible, to continue the longitudinal bisection at the apex throughout the vein on its dip or downward course; and because it conforms to the principle pervading the mining laws, that priority of discovery and of location gives the better right, as is illustrated in the provision giving to the senior claim all ore contained in the space of intersection where two or more veins

intersect or cross each other, and in the further provision giving to the senior claim the entire vein at and below the point of union, where two or more veins with distinct apices and embraced in separate claims unite in their course downward. Rev. Stat. § 2336, U. S. Comp. Stat. 1901, p. 1436."

We fully indorse the views thus expressed. Discovery is the all-important fact upon which title to mines depends. * * * To take from the discoverer a portion of that which he has discovered and give it to one who may have been led to make an adjoining location by a knowledge of the discovery, and without any previous searching for mineral, is manifest injustice.

Again, as indicated in the quotation from the court of appeals, continuing the line of division shown upon the surface through the descending vein would be attended with great difficulty and uncertainty. Dealing with questions of this nature, a practical view must be taken. Veins do not continue of uniform width in their descent, but are often irregular and broken, and to attempt to make a division of ore according as it appears on the surface, or equally, would require the constant supervision of a court. It is not strange, then, that the custom of miners has been, as stated by the court of appeals, to regard and treat the vein as a unit and indivisible in point of width, and belonging to the discoverer. * * *

But it is contended by the defendants that both the entries and patents of the Ashland and Kempton claims were prior in time to the entries and patents of the Old Jordan and Mountain Gem, and that such priority of entry and patent conclusively establishes the prior right of the owners to this broad vein; that the failure of the owners of the Old Jordan and Mountain Gem to adverse the applications of the owners of the Ashland and Kempton for patent was an admission that the latter had priority of right, and is conclusive against any present testimony as to the dates of the location. We had occasion in the recent case of Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266, to consider to what extent the issue of a mining patent worked an estoppel of the claims of third parties, and it is unnecessary now to repeat the discussion there had.

This case presents the question under different aspects. The entries and patents of the Ashland and Kempton claims were, as stated, prior in time to the entries and patents of the Old Jordan and Mountain Gem. There is no record of any adverse suits, although it is intimated that there were such suits. In the absence of a record thereof we cannot assume that anything more was presented and decided than was necessary to justify the patents. A patent is issued for the land described, and all that is necessarily determined in an adverse suit is the priority of right to the land. * * *

Without determining what would be the effect of a judgment in an

adverse suit in respect to subterranean rights, if any were in fact presented and adjudicated, it is enough now to hold that there is no presumption, in the absence of the record, that any such rights were considered and determined. Indeed, in the absence of a record, or some satisfactory evidence, it is to be assumed that the patents were issued without any contest and upon the surveys made under the direction of the United States surveyor general, and included only ground in respect to which there was no conflict. If the surface ground included in an application does not conflict with that of an adjoining claimant, the latter is in no position to question the right of the former to a patent. Take the not infrequent case of two claims adjoining each other, the boundary line between which is undisputed. If the owner of one applies for a patent the owner of the other is clearly under no obligation to adverse that application, even if, under any circumstances, he might have a right to do so. Other necessary conditions being proved, the applicant is entitled to a patent for the ground. Generally speaking, if the boundary between the two claims is undisputed the foundation for an adverse suit is lacking. While a patent is evidence of the patentee's priority of right to the ground described, it is not evidence that that right was initiated prior to the right of the patentee of adjoining tract to the ground within his claim.

Section 2336, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1436), makes provision for conflict as to certain subterranean rights. The last sentence of the section reads: "And, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Argentine Min. Co. v. Terrible Min. Co. supra. As the place of union may be far below the surface, this evidently contemplates inquiry and decision after patent, and then it can only be in the courts. And the same rule will obtain as to other subterranean rights. * * *

Summing up our conclusions, the findings of fact as stated in the opinion of the court of appeals are not clearly against the testimony, and must, therefore, be sustained. According to those findings there was a single broad vein,—the apex or outcroppings of which extended through the limits of some of the plaintiff's and defendants' claims,—and not several independent veins. The ore which was being mined and removed by the defendants was taken from this single broad vein beneath the surface ground of claims belonging to the plaintiff. Where there is a single broad vein whose apex or outcroppings extend into two adjoining mining claims the discoverer has an extralateral right to the entire vein on its dip. Acceptance by the government of location proceedings had before the statute of 1866, and issue of a patent thereon, is evidence that those location proceedings were in accordance with the rules and customs of the local mining district. The priority of right to a single broad vein vested in the discoverer is not determined by the dates of the entries or patents

of the respective claims, and priority of discovery may be shown by testimony other than the entries and patents. In the absence from the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface.

From these conclusions it is obvious that the decision of the Circuit Court of Appeals was right, and it is affirmed.

(b) *Secondary Veins.*

WALRATH v. CHAMPION MIN. CO.

1898. Superior Court of the United States.
171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. 909.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

This action, brought in the superior court of Nevada, Cal., involves title to a triangular shaped section of what is known as the "Contact," "Ural," or "Back" ledge of gold-bearing ore, situated in the same county, claimed by appellant to be a portion of the Providence mine, to which complainant has title through a patent from the United States; and by appellee, a corporation, to be a part of the New Years Extension mine, owned by it.

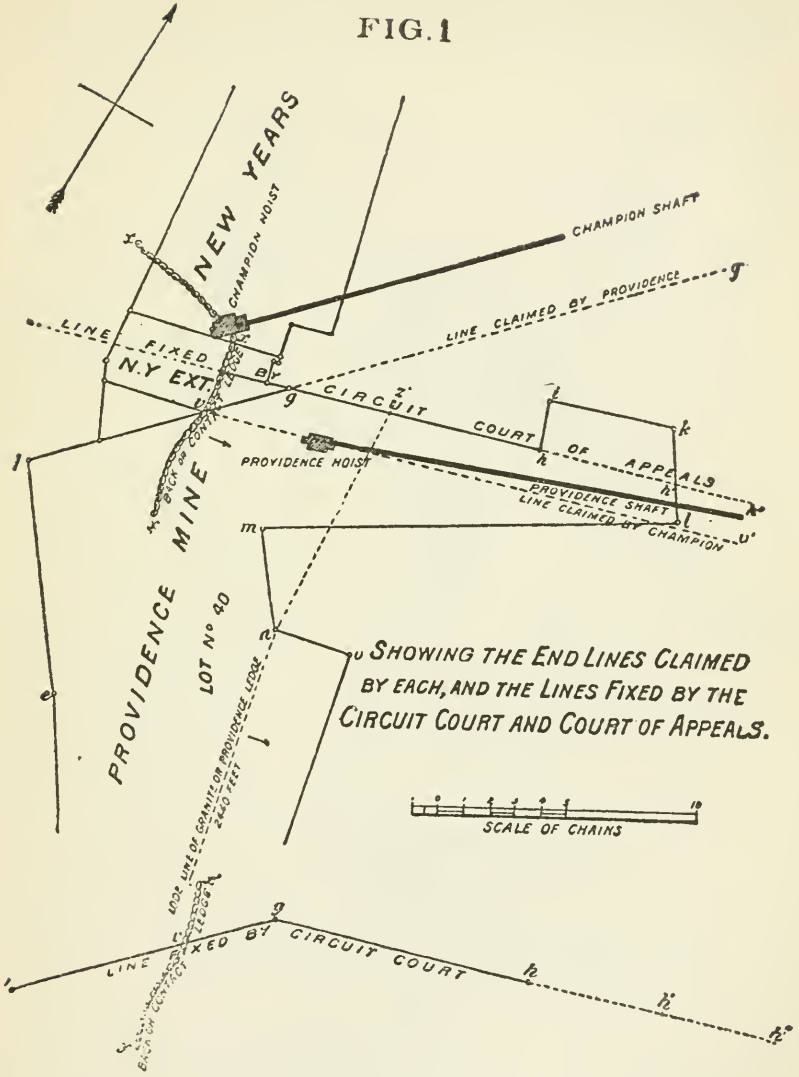
The relative situation of the two properties, and the portion of the ledge in controversy, is shown by the following, Fig. No. 1 (the disputed section being contained between the lines thereon marked "Line claimed by Providence," and "Line claimed by Champion"):

The figures marked "New Years" and "New Years Extension" represent the surface of the mining properties owned by defendant, while that marked "Providence Mine" represents the surface of the patented ground of the plaintiff.

The action was brought May 24, 1892, to recover $300,000 damages for ore extracted from the ledge and carried away by the defendant, and for an injunction against further trespasses thereon.

Upon motion of appellee, the action was removed to the United States circuit court, as involving a federal question, where the complainant recast his pleadings so as to separate the action into a bill in equity, upon which the action is now proceeding, and an action at law for the damages alleged.

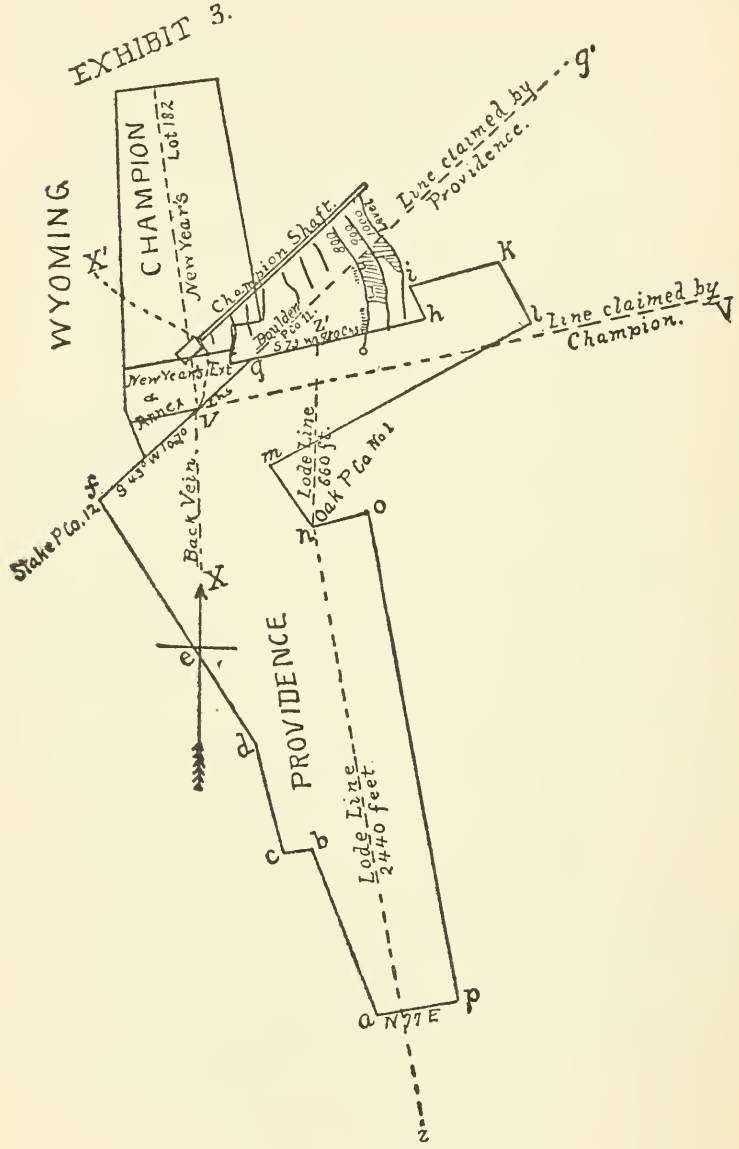
FIG. 1



SHOWING THE END LINES CLAIMED BY EACH, AND THE LINES FIXED BY THE CIRCUIT COURT AND COURT OF APPEALS.

The suit in equity was tried in the circuit court, and decided mainly in favor of the appellee. 63 Fed. 552.[18]

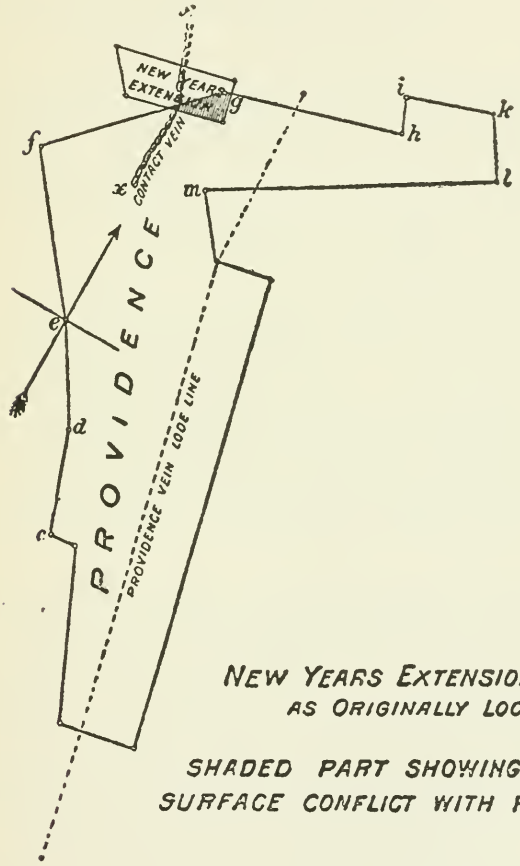
[18] The diagram found on page 554 of this case was as follows:



From this decree the appellant appealed to the court of appeals for the Ninth circuit, where it was modified, and as modified affirmed. 19 C. C. A. 323, 72 Fed. 978.

The appellant now brings the case to this court upon writ of error from the court of appeals.

FIG. 2.


NEW YEARS EXTENSION
CONTACT VEIN
PROVIDENCE
PROVIDENCE VEIN LODE LINE
NEW YEARS EXTENSION AS ORIGINALLY LOCATED.
SHADED PART SHOWING LODE AND SURFACE CONFLICT WITH PROVIDENCE.

The appellant's title is deraigned as follows: In 1857, under the miners' rules and customs then in force, 31 locators located 3,100 feet of the Providence or Granite lode. By mesne conveyances the title to this location became vested in the Providence Gold & Silver Mining Company; and on April 28, 1871, that company obtained a patent

to 3,100 feet of the lode, and for surface ground, as described in the patent.

The title thus granted to the Providence Gold & Silver Mining Company was, before the commencement of this suit, vested in the appellant.

The ledge, as granted by the patent, extends 30 feet north of the north surface line of the location, and some 680 feet south of the south surface line.

The patent conveyed only the Providence ledge and the surface ground. All other ledges contained within the surface lines were expressly reserved.

It is also contended by appellant that by the act of congress of May 10, 1872, exclusive possession of all the surface included within the lines of the location was granted to the owners of the Providence, together with all other lodes or ledges having their tops or apexes within such surface lines. This grant, of course, included the Contact vein, subsequently discovered within said boundaries, and now constituting the bone of contention in this action.

The Contact vein is shown in the figure, and crosses the surface line f–g of the Providence location.

On September 29, 1877, the appellee and defendant, the Champion Mining Company, made a location upon the Contact vein, called the "New Years Extension Mine." This location overlapped, both as to surface ground and lode, upon the Providence location; that is, the lode line and surface lines of the said New Years Extension extended to the south of the boundary line, f–g, of the Providence location.

The New Years Extension mine is shown in the following, Fig. No. 2, together with the conflict caused by the overlap (the conflicting surface portion being shaded, and showing the Contact vein passing through it).

In the year 1884 the complainant and his co-owners objected to the overlap, and demanded of the Champion Mining Company that it abandon all claims to the surface and lode to the south of the Providence boundary line, above described. Thereupon, in the month of November, 1884, John Vincent, the superintendent of the defendant, the Champion Mining Company, under the authority and by the direction of the said company, relocated the New Years Extension mine by a notice of relocation, in which the fact of the overlap under the original location was particularly recited; and the lines were readjusted so as to avoid the overlap, and to conform to said line f–g of the Providence mine, as shown on Fig. 1.

In the notice of relocation the lode line was particularly described as follows: "The lode line of this claim, as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer creek, which point is 60 feet S., 11 degrees 45 minutes east, of the mouth of the New Years tunnel,

and running thence along the line of the lode towards the N. E. corner of the Providence mill, about S., 46 degrees 15 minutes east, 200 feet, more or less, to a point and stake on the northerly line of the Providence mine, patented, designated as 'Mineral Lot No. 40,' for the south end of said lode line."

It also contained the following statement:

"And whereas, part of this claim, as originally described, and as hereby relocated, conflicts with the rights granted by letters patent of said Providence mine, said lot No. 40: Now, therefore, so much of this claim, both for lode and surface ground, as originally conflicted or now conflicts with any portion of the surface or lode claims or rights granted by said patent, is and are hereby abandoned, which portion of this claim so abandoned is described as follows: All that portion of the above-described New Years Extension claim for surface and lode which lies south of the northern boundary line of said Providence mine, which runs north, 43 degrees 10 minutes east, across the southeastern corner of this claim."

The New Years Extension, as relocated, is coterminous with the Providence mine on the northerly boundary line, designated as the line f–g, running S., 43 deg. W. Fig. 1.

That line is the only boundary between the two properties, and the only boundary of the Providence location which is crossed by the Contact ledge.

The first workings of the appellee involved no conflict with appellant. The shaft ran parallel with the Providence line, and none of the levels crossed that line until about three months before this suit was begun, when the 1,000-foot level was driven across it into the ground in dispute. Subsequently the eighth and ninth levels were driven across.

The work done by the Providence was carried on through a shaft sunk on the Providence or Granite ledge, from which shaft a crosscut was run back to the Contact vein on the 600-foot level, and another on the 1,250-foot level; and much of the ground now in controversy was thereby prospected and opened up by complainant and his co-owners. See Fig. 1.

The claims of the respective parties will be readily understood by reference to Fig. 1, which shows the relative position of all the mining properties belonging to both, with the lines claimed by them.

The portion of the Contact vein in dispute is that upon the dip of the ledge lying between the lines marked "Line claimed by Providence" and the line marked "Line claimed by Champion."

The apex of the Contact vein is represented by the dotted line $x–x^1$, and shows the vein as far as exposed in both the Champion and Providence ground. South of x, the course of the vein in the Providence ground is unknown.

The line f–g is the same line as that designated A–B by some of the witnesses.

Upon the trial the circuit court held that there could be but one end line for each end of the Providence location, and that the lines g–h and a–p constituted such end lines; that such lines constituted the end lines of not only the originally discovered Providence lode, but also of every other vein that might be discovered within the surface lines of the location. But, notwithstanding this holding, in entering the decree the line f–g was also established as an end line of the Contact vein, but for its length only, and then that from g the line g–h, and that line extended indefinitely eastwardly, constituted another end line for the same end of the lode, and constituted the line through which the plane determinative of all extralateral rights in the vein must be drawn.

From this decree the appellant here was allowed an appeal to the circuit court of appeals.

The latter court established the line g–h–h^1 as the sole end line of the Contact vein, and reversed the decree of the circuit court in so far as it fixed the line f–g as an end line.

As a result of this decree the complainant was not only shut out of all extralateral rights in the Contact vein north of the line g–h–h^1, but also of that portion of the vein lying vertically beneath the surface lines of the Providence which extend north of that line, and which are marked upon the figures as constituting the parallelogram h–i–k–h^1, which was awarded to the Champion. See Fig. 1, showing the end line fixed by the circuit court and that line as subsequently fixed by the court of appeals, with the latter line extended in its own direction both easterly and westerly.

From the judgment of the circuit court of appeals the appellant has appealed to this court.

There are nine assignments of error. The first eight attack so much of the decree as establishes the line g–h as an end line, for the purpose of determining the extralateral right, or fails to establish the line f–g, and that line produced indefinitely in the direction of g^1, as such end line. The last two assail so much of the decree as awards to appellee the right to pursue the vein on its downward course underneath the parallelogram h–i–k–h^1.

Mr. Justice McKenna, after stating the facts in the foregoing language, delivered the opinion of the court.[19]

There are two questions presented by the assignment of errors:

(1) What are the extralateral rights of the appellant on the Contact vein?

(2) Is appellant entitled to that portion of the Contact vein within the Providence boundaries which lies north of the north end line

[19] A part of the opinion which discusses an agency question is omitted.

fixed by the court, and which is described upon Fig. 1 as the parallelogram bounded by the lines marked h–i–k–h^1?

1. The appellant contends that the patent of the Providence ledge was conclusive evidence of his title to 3,100 feet in length of that vein. If true, this carried the northern end of the ledge 30 feet beyond the line fixed by either the circuit court or the circuit court of appeals. It was truly said at bar: "If it is not the end line of the Providence location, then certainly there is no reason for holding it to be the end line of the Contact vein."

The language of the patent is: "It being the intent and meaning of these presents to convey unto the Providence Gold and Silver Mining Company, and to their successors and assigns, the said vein or lode in its entire width for the distance of thirty-one hundred (3,100) feet along the course thereof."

The patent was issued under the act of 1866, and it is necessary, therefore, to some extent, to consider that act. By it, the appellant urges, the principal thing patented was the lode, and that the northern limit of that, and hence of his rights on that, was 30 feet north of the line fixed by the circuit court of appeals; and hence it is further contended that, as the northern and southern surface lines (g–h and a–p) did not determine or limit his right to the lode under the act of 1866,—in other words, did not become end lines,—they do not become end lines upon the Contact ledge (x′–x″) acquired under the act of 1872, but that the surface line which crosses the strike of that ledge must be held to be the end line, and the line which fixes the rights of the parties. This line is f–g, Fig. 1, and, if appellant is correct, determines the controversy in his favor.

The extent of the right passing under the act of 1866 has been decided by this court.

In Mining Co. v. Tarbet, 98 U. S. 463, known as the "Flagstaff Case," the superficial area of the Flagstaff mine was 100 feet wide by 2,600 feet long. It lay across the lode, not with it; and the company contended, notwithstanding that, it had a right to the lode for the length of the location. In other words, the contention was that it was the lode which was granted, and that the surface ground was a mere incident for the convenient working of the lode. The contention was presented and denied by the instructions which were given and refused by the lower court. That court instructed the jury that if they found Tarbet "was in possession of the claim (describing it), holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface, then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary, and extends beneath other and

adjoining lands; and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful, to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways,—by the length of the course of the vein within the surface, and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

And the following instructions propounded by the owner of the Flagstaff:

"By the act of congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed. The lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode. The patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim. It was his convenience for working the lode that controlled his location of his surface area; and the patentee, under that act, takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Commenting on the instructions, Mr. Justice Bradley, speaking for the court, said:

"These instructions and refusals to instruct indicate the general position taken by the court below, namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction."

And after stating that the act of 1872 was more explicit than that of 1866, but the intent of both undoubtedly the same, as it respects lines and side lines, and the right to follow the dip outside of the latter, he proceeded as follows:

"We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode, and extend perpendicularly downwards, and to be continued in their own direction either way horizontally, and that the right to follow the dip outside of the said lines is based on the hypothesis that the direction

of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his said lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their said lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

"The location of the plaintiff in error is thus laid across the Titus lode (that is to say, across the course of its apex at or near the surface); and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface.

"As the law stands, we think the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called, which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See Rock. Mines, pp. 56–58, and pp. 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it."

This law was followed and applied in Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, and in Iron-Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177; King v. Mining Co., 152 U. S. 222, 14 Sup. Ct. 510. The locations passed upon in these cases were made under the act of 1872, but we have seen that the intent of that act and the act of 1866, "as it respects end lines and side lines," was the same.

But appellant urges that "those cases are not in point here." We think that they are. The patent in the Flagstaff Case appears to have been the same as here, and, besides, whatever the patent here, it must be confined to the rights given by the statute which authorized it.

In the Flagstaff Case the lode was claimed, and hence the right to follow it beyond the surface boundaries of the location was claimed. Here the lode is claimed, and the right to follow it outside of the surface boundaries; that is, beyond the line f–g to the point x^1. In that case the right contended for was denied on the principle applicable

to end and side lines. In this case the right contended for must be denied by the application of the same principle.

But, appellant asks, admitting for the argument's sake that it (the line g–h) does constitute an end line of the location, within the meaning of the law of May 10, 1872, does it constitute the end line of the Contact vein? And in answering the question he says: "The end line of a lode is the boundary line which crosses it, regardless of whether it was originally intended as an end line or side line. Four times has this principle been sustained by this court." He then cites the cases we have cited, and claims that they "are, of course, conclusive of this controversy, if they are in point."

Under the law of 1866 a patent could be issued for only one vein. 14 Stat. 251. The act of 1872 gave to all locations theretofore made, as well as to those thereafter made, all veins, lodes, and ledges, the top or apex of which lie inside of the surface lines. Section 3 of the act, which is also section 2322 of the Revised Statutes, is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Act May 10, 1872, § 3 (Rev. St. U. S. § 2322).

Appellant's right upon the Contact vein is given by this statute. What limits this right extralaterally? The statute says, vertical planes drawn downward through the end lines of the location. What end lines? Those of, and as determined by, the original location and lode, the circuit court of appeals decided. Those determined by the direction of the newly-discovered lodes, regardless of whether they were originally intended as end lines or side lines, the appellant, as we have seen, contends. The court of appeals was right. Against

the contention of appellant the letter and spirit of the statute oppose, and against it the decisions of this court also oppose.

The language of the statute is that the "outside parts" of the veins or ledges "shall be confined to such portions thereof as lie between vertical planes drawn downwards * * * through the end lines of their locations. * * *" And Mr. Justice Field, speaking for the court, said in Iron-Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196–198, 6 Sup. Ct. 1183:

"The provision of the statute that the locator is entitled, throughout their entire depth, to all the veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips; yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all the veins, if they are not identical."

The court, however, did not mean that the end lines, called such by the locator, were the true end lines, but those which "are crosswise of the general course of the vein *on the surface.*"

This court, in Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co. (decided at the present term) 18 Sup. Ct. 895, reviewed the cases we have cited; and, speaking for the court, Mr. Justice Brewer said:

"Our conclusion may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location, as the locator places them, establish the limits beyond which he may not go in the appropriation of a vein on its course or strike, is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines; and this, upon the proposition that it was the intent of congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each

claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." Mining Co. v. Tarbet, 98 U. S. 463–468.

These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries.

The appellant contends that by agreement, by acquiescence, and by estoppel, the line f–g has become the end line between the two claims.

This contention is attempted to be supported by (a) a relocation of the New Years Extension claim, by which, it is asserted, it recognized and designated the line f–g as the northerly end line of the Providence claim; (b) the testimony of the superintendent as to what took place between him and the directors before sinking the Champion shaft, and afterwards between him and a co-tenant of complainant (appellant).

(a) The relocation does not in terms recognize the line f–g as the northern end line of the Providence. Its recitals are:

"And whereas, part of this claim, as originally described, and as hereby relocated, conflicts with the rights granted by the letters patent of said Providence mine, said lot No. 40: Now, therefore, so much of this claim, both for lode and surface ground, as originally designated, conflicting, or now conflicts, with any portion of the surface or lode, claims or rights, granted by said patent, is and are hereby abandoned.

"Which portion of this claim so abandoned is described as follows: All that portion of the above-described New Years Extension claim for surface and lode which lies south of the northern boundary line of said Providence mine, which runs north, 43 degrees 10 minutes east, across the southeastern corner of this claim."

It will be observed, by reference to Fig. 1, that the northern boundary of the Providence is not one line, but two lines, and it is the one which runs north, 43° 10′ east, across the southern corner, which is designated in the relocation of the New Years claim.

In the notice of relocation, however, the northerly line of the Providence is called the south end line of the relocated ground. The description is as follows:

"The lode line of this claim, as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer creek, which point is 80 feet S., 11 deg. 45 minutes east, of the mouth of the New Years tunnel, and running thence along the line of the lode towards the N. E. corner of the Providence mill about S., 46 deg. 15 minutes east, 200 feet, more or less, to a point and stake on the northerly line of the Providence mine, patented, designated as 'Mineral Lot No. 40,' for the south end of said lode line, and that the Contact vein crosses in its onward

course the southerly end line of said New Years Extension claim, and enters the lands and premises of plaintiff described in said bill of complaint."

It is hence contended that, if the line f–g is the southerly end line of the New Years Extension, it must necessarily be the northern end line of the Providence mine. This does not follow, nor is there any concession of it. Coincidence of lines between claims does not make them side lines or end lines. Whether they shall be so regarded depends upon the legal considerations, which we have already sufficiently entered into, and need not repeat. We do not say that there may not be an agreement settling end lines. One example of such an agreement was exhibited in Richmond Min. Co. v. Eureka Min. Co., 103 U. S. 839.

(b) The testimony relied on was admitted against the objection of defendants (appellees). * * *

This testimony does not establish an equitable estoppel, nor is the corporation bound by the declarations of the superintendent. They were without the scope of his agency or authority.

2. The right to that portion of the Contact ledge within the boundaries of the parallelogram h–i–k–h^1 presents an interesting question. It does not appear to have been submitted to either of the lower courts, but the right by the decree of the circuit court is given to appellee, by adjudging to it that portion of the vein on its dip which lies northeasterly of the line g–h and its continuation.

The question is a new one in this court, but we think it is determined by the principles hereinbefore laid down. It may be true that under the act of 1866 the patenting of the Providence mine in its irregular shape was in all respects legal and proper, and that the act did not require the location to be made in the form of a parallelogram, or in any particular form, and that there was no requirement that the end lines should be parallel. It is also true that under that act only one vein could be included in a location, no matter how much surface ground was included in the patent, but that under the act of 1872 possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout the entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, were given.

But rights on the strike and on the dip of the original vein, and rights on the strike and on the dip of the other veins, we have decided, are determined by the end lines of the location. In other words, it is the end lines alone, not they and some other lines, which define the extralateral right; and they must be straight lines, not broken or curved ones. The appellant, under his contention, would get the right such lines would give him, and something more, besides, outside of them. To specialize, he would get all within a plane drawn through the line g–h, and all within the planes drawn through the sides of the parallelogram h–i–k–h^1, Fig. 1.

It may be that the end lines need not be parallel, under the act of 1866; may converge or diverge; and may even do so as to new veins, —of which, however, we express no opinion. But they must be straight. No other lines define planes which can be continuous in their own direction, within the meaning of the statute. It may be that there was liberty of surface form under that act, but the law strictly confined the right on the vein below the surface. There is liberty of surface form under the act of 1872. It was exercised in Iron-Silver Min. Co. v. Elgin Mining & Smelting Co., supra, in the form of a horseshoe; in Montana Co. v. Clark, 42 Fed. 626, in the form of an isosceles triangle.

The decree is affirmed.[20]

COSMOPOLITAN MIN. CO. v. FOOTE ET AL.

1900. CIRCUIT COURT, D. NEVADA. 101 Fed. 518.

In Equity. Suit to determine the rights of owners of adjoining mining claims.

HAWLEY, District Judge.—Complainant is the owner of the Cosmopolitan patented mining claim, 1,000 feet in length and 600 feet in width, situate in Gold Hill mining district, Storey county, Nev. The patent was issued in October, 1873. Defendant Lottie Foote is the owner of a mining claim and location situate in the same mining district, immediately west of the Cosmopolitan, and called the "Badger." There is no controversy in relation to the surface lines of the Cosmopolitan claim. The complainant claims that there is a lode bearing mineral in the Cosmopolitan claim near its westerly side line, having a northerly and southerly course, with a dip to the east, and that the apex of this lode is within the Cosmopolitan surface location, except for a distance of a few feet, where a very small part

[20] See an article on the principal case by Mr. John M. Zane in 16 Harv. Law Rev. 94. In connection with that article should be noted Mr. Lindley's subsequent explanation of the failure of the Champion Company to appeal, namely:

"No cross appeal was taken by the Champion Company to either of the appellate courts for economic reasons. All of the vein within the New Year's and New Year's Extension claims north of the plane f-g had been worked out years before the litigation arose. There was nothing of value there to justify litigation. The narrow strip of ground between the plane claimed by the Champion, v-v^1, and the one fixed by the court, g-h-h^1, did not embrace the ore 'shoot' and was practically valueless. The valuable ore bodies over which the litigation arose, and which alone engaged the attention of either courts or litigants, were within the triangle formed by the line g-h-h^1 and the one claimed by the Providence, f-g-g^1. The only object to be gained by prosecuting a cross-appeal would have been to secure the establishment of a principle to be followed in other cases."—2 Lindley on Mines, 2 ed., p. 1043, § 593, note.

of it extends over the surface line into the Badger from 5 to 15 feet, more or less. The lode, as claimed by complainant, is in two branches at the southerly end, each branch being from 30 to 50 feet wide, and which, going north, unite in one vein, from 60 to 100, or more, feet wide. The defendants claim there is a lode near the east side line of the Badger, having its course north and south along the entire length, with a hanging and foot wall, wholly within the Badger surface lines. The contest between the parties is in relation to the apex of the respective lodes, and upon that question a mass of evidence has been submitted by the respective parties. There is a decided conflict in the evidence upon this point.

In the year 1875 some work was done by the complainant in running an upper and lower tunnel into the Cosmopolitan ground. The mouth of the upper tunnel commenced near a point where a blacksmith shop was afterwards erected, about 100 feet southwesterly from the southwest corner of the Cosmopolitan claim. This tunnel runs in a northeasterly direction a distance of about 400 feet through the Cosmopolitan claim. At a point about 100 feet from its face the tunnel makes a turn, and runs more in a northwesterly direction. This tunnel was constructed by the complainant. Leases and licenses were at different times from 1894 to 1898 given to different parties to work therein and take ore therefrom. The rails in the tunnel, and cars to convey the ore, were supplied and paid for by the complainant. During the years 1895 and 1896 the Footes, father and sons, made several applications to Mr. Landers, the president of the Cosmopolitan Company, for the privilege of taking ore out of the Cosmopolitan claim through this tunnel. None was ever given them. Mr. Staricha in 1895, under a lease from complainant, extended the tunnel and took out ore from the stope called the "Staricha Stope," distant about 100 feet from the southerly line of the Cosmopolitan mine. In 1896 an incline from this stope was opened out to the surface, and came out near to, but west of, the westerly line of the Cosmopolitan claim. Around this stope and incline, and the character of the earth, rock, and other material found therein, cluster the most important facts upon which each of the parties relies to prove where the apex is found. In 1898 the defendants entered into the tunnel, took possession thereof, and excluded complainant therefrom, and at or near the face thereof stoped out a large quantity of ore, and were so engaged at the time of the commencement of this suit, and continued to work thereon for some time thereafter. At the trial the contention of the defendants was that the ore thus taken out belongs to a lode which has its apex within the surface lines of the Badger claim, and that they have the right to follow said lode in its downward course into the Cosmopolitan ground, although there may have been a mistake made in locating the ledge.

The Badger is a relocation, made in 1884. The notice of relocation reads as follows:

"Location Notice. Badger Mine.
"Notice is hereby given that I, the undersigned, have this day relocated 1,000 feet of the south end of the Badger mine & 500 feet of the north end of the Margarita mine, in Storey county, Nevada, for mining purposes. This location is made subject to the mining laws of the United States and the state of Nevada. My residence is Silver City, Lyon county, Nevada, and am a citizen thereof. The said mine is situated in Negro ravine, adjoining the Flora Temple on the north, and west of the Cosmopolitan mines. July 14th, 1884. This claim shall be known as the 'Badger Mine.' George Foote."

At the time this location notice was posted there was a lode exposed within the surface lines of the location, running in an easterly and westerly direction. The rights of the defendants are based solely upon this relocation. If it was made upon a lode running in an easterly and westerly direction, then the side lines marked on the surface as such would become, in the eye of the law, the end lines of the location, and the end lines marked on the surface would become the side lines of the claim. The testimony concerning the relocation is very meager. Mr. Foote testified: That he made the relocation on a lode running in a northerly and southerly direction. That he placed the location notice at or near the center of the surface claim, and at a point marked "O" on the map. That ore was disclosed at that point. That there was a hole dug about 350 feet northerly from that point, which disclosed ore, and another one at a point about 750 feet southerly from the location point. At the point of location there is a cut 6 or 7 feet long, 2 feet wide, and 1 foot deep in vein matter. The hole towards the north line of the Badger is an opening 5 feet wide and 15 feet in length, in which ore is exposed. The hole towards the southern line of the Badger is 2 feet square and 1 foot deep, and is in solid country rock. The testimony in rebuttal was to the effect that the character of the ground between the hole at the north and the location point was in solid country rock. The witness Wrinkle said: Part of the country "is covered by surface dirt, but quite a large stretch is exposed, and it is solid country rock." The same is true of the ground between the location point and the hole at the southerly end of the claim. The witness said, "Wherever the ground is laid bare,—no surface dirt covering it,—it is nothing but country rock." The same witness, speaking with reference to the explorations in the Badger tunnel, testified as follows:

"Q. State whether or not any other vein appears in that tunnel, except the one that you have shown on the map,—any vein running northerly and southerly. A. No; there is not. * * * Q. State whether or not any vein running northerly or southerly is shown in that tunnel. A. No. Q. What indications are there, if any, on the surface between the opening shown to you near the north line, 200 feet from it, and the location point, or the location point and the opening 150 feet or so from the south line of the Badger,—

what indication between those points of any vein whatever? A. There are none."

There are surrounding circumstances in connection with the testimony upon this point as to the course of the lode that ought not to be overlooked. No attempt was made upon the part of the defendants, except by the testimony of Mr. Foote, to establish the fact of the existence of any lode running northerly and southerly from the location point, which was and is of as much importance as the establishment of the existence of a lode running in that direction near the easterly line of the Badger claim. There is no pretense that the relocation was made upon the lode in dispute at the easterly line of the Badger location, or that there is any possible connection between that lode and the one located by Mr. Foote. The defendants' contention seems to be that because, as they claim, they have subsequently discovered the apex of a lode running northerly and southerly at the easterly line of their surface location, they have a right to follow that lode in its dip underneath the Cosmopolitan claim, without any regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location, and find out what the defendant Foote located, because, if he located upon a lode that he thought had a northerly and southerly course, and made his relocation accordingly, and the subsequent developments proved that the locator was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his rights by the facts as they are shown to exist, instead of what he thought existed at the time the location was made. The testimony given by the locator is wholly insufficient to show that any lode, ledge, or vein had been discovered by him, or the prior locators of the ground, having a northerly or southerly course at the point of location. When the entire testimony is taken into consideration, it is made manifest that no such ledge exists, or at least that none has ever been discovered. The point of the relocation where the notice was posted was near to a well-defined lode, called by some of the witnesses the "Badger," and by others the "Margarita," which has a course clearly defined in an easterly and westerly direction, and upon which the Footes have been at work for years. No claim that his location was made upon a lode running north and south seems ever to have been made by the locator prior to the time of the trial, nor until after complainants' counsel had publicly stated that the relocation of the Badger was made upon a lode running east and west, and that the locator's side lines would be his end lines, and cut off his extralateral rights in that direction. Foote testified that he had never informed his counsel to that effect, nor had he given any such information to the surveyor employed by the defendants. But, whatever

his claim may have been,—whatever his intentions were,—the fact remains that the relocation was absolutely made upon a lode which runs more east and west than north and south; and the law steps in and declares that his legal rights under this location must be determined by calling what he marked as the side lines the end lines of his location. This being true, it follows that he is not entitled to any extralateral rights beyond his end line along the western side line of the Cosmopolitan. The law upon this point is well settled. The principles which govern and control this question were first announced by the supreme court in Minnig Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253, affirmed in Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 485, 7 Sup. Ct. 1356, 30 L. Ed. 1140, and followed in Del Monte Co. v. Last Chance Co., 171 U. S. 55, 86, 89, 18 Sup. Ct. 895, 43 L. Ed. 72, and Walrath v. Mining Co., 171 U. S. 293, 307, 18 Sup. Ct. 909, 43 L. ed. 170. See, also, Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 208, 6 Sup. Ct. 1177, 30 L. Ed. 98; King v. Mining Co., 152 U. S. 222, 228, 14 Sup. Ct. 510, 38 L. Ed. 419; Wyoming Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540; Walrath v. Mining Co. (C. C.) 63 Fed. 552, 557; 2 Lindl. Mines, § 586 et seq. Numerous other authorities will be found cited in the cases here referred to.

In Argentine Min. Co. v. Terrible Min. Co., supra, the court, in discussing this question, said:

"When, therefore, a mining claim crosses the course of the lode or vein, instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface. Such is the purport of the decision in Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253. The court there said, referring to the statute of 1866 (14 Stat. 251) and that of 1872 (17 Stat. 91): 'We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode and extend perpendicularly downward, and to be continued in their own direction either way horizontally, and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of the vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have property located on the lode.' And again that the end lines of the claim, properly so called, are 'those which are crosswise of the general course of the vein on the surface.' Such being the law, the lines which separate the location of the plaintiff below from the location of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and, as a consequence, could not touch the premises in dispute, which are conceded to be outside of those lines, and outside of vertical planes drawn downward through them."

In Wyoming Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540, 548, I said:

"The statute should be so construed as to give to the locator what he actually locates,—no more and no less. * * * He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he is at the same time assured that he will not be limited or deprived of his extralateral rights as to the depth of such lode, upon its dip, the apex of which is within the surface lines of his location. The statute of 1872 gives to locators of mining claims 'the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes or ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in the course downward as to extend outside the vertical side lines of such surface locations.' These are their extralateral rights, which should neither be extended nor restricted by the courts. * * * One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon its strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the locations must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than with the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute."

Still more directly in point are the views expressed by myself in Walrath v. Mining Co. (C. C.) 63 Fed. 552, 557:

"The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. And it is apparent from an examination of the statute that the court has no power to make a new location for every vein that may be found within the surface lines of the location, and thereby enlarge the rights of the original locators. When the end lines of a mining location are once fixed, they bound the extralateral rights to all lodes that are thereafter found within the surface lines of the location. It necessarily follows that the end lines of the Providence [Badger] survey must be considered by the court as the end lines of any and all other lodes or veins which lie 'inside of such surface lines'; otherwise, endless confusion would arise in the construction of the statute. End lines would have to be constructed in different directions if the separate lodes or veins found within the surface lines did not run parallel with each other, and the result would be that these lines, extended, might give to the owner of the claims a greater length along the lode as it extended downward than they had upon the surface."

These views are conclusive as to the present controversy between the parties. They apply as well to the "dumping ground" claimed by the complainant as to the lode within the surface boundaries of the Cosmopolitan claim. The owner or owners of the Badger claim, under the location made by Mr. Foote, can only claim 300 feet on

each side of the middle of the lode located by him;[20a] and, as thus limited, it does not reach any part or portion of the dumping ground of the Cosmopolitan Company. They are, of course, entitled to all lodes, ledges, veins, and deposits of mineral-bearing rock, earth, or ore, the apex of which is found within the limits of the Badger location as herein defined, but they are confined in such rights to the end line drawn downward vertically along the westerly side line of the Cosmopolitan claim. Beyond that they have no right to go.

In the light of these conclusions, it is unnecessary for the court to travel over the surface ground, pass through the tunnels, go up the stopes or down into the winzes, through the drifts and into the cuts and holes, visit the dump, or inspect the croppings, and then test and weigh the credibility, strength, and reasonableness of the testimony of the various witnesses by legal scales, for the purpose of determining the mooted question as to the existence or non-existence of a lode having its apex within the surface lines of the Badger claim west of and near to the Cosmopolitan westerly side line. Let a decree be entered in favor of complainant.

ST. LOUIS MIN. & MILL. CO. OF MONTANA v. MONTANA MIN. CO.

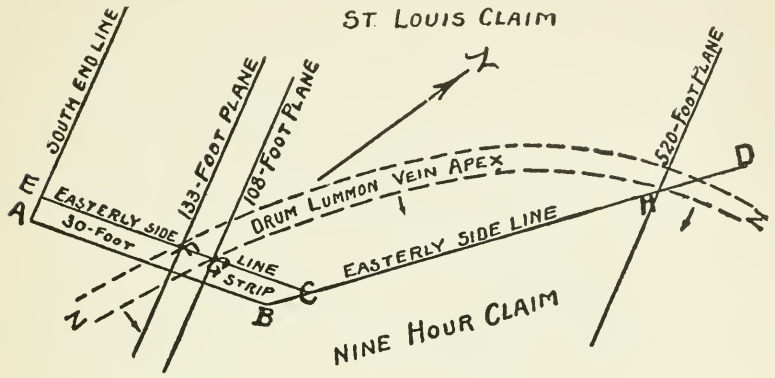
1900. Circuit Court of Appeals. 44 C. C. A. 120, 104 Fed. 664.

In Error to the Circuit Court of the United States for the District of Montana.

This is an action originally brought by the St. Louis Mining & Milling Company, a Montana corporation, plaintiff in error, in the circuit court of the United States for the district of Montana, to recover damages for trespass, and the value of certain ores alleged to have been wrongfully appropriated and taken by the Montana Mining Company, Limited, a corporation of Great Britain, defendant in error. After trial by a court and jury, resulting in a verdict for the plaintiff in error in the sum of $23,209, plaintiff in error now brings the suit to this court upon certain assignments of error, which, it alleges, deprived it of a larger verdict. There is practically no contention between the parties as to the facts. The plaintiff in error is the owner of the St. Louis mining claim, situated near Marysville, in the state of Montana; and the defendant in error owns the Nine Hour mining claim, adjoining the St. Louis claim on its easterly side. The St. Louis claim is the older location. It contains two veins, known in the record as the Discovery vein and the Drum

[20a] But see Harper v. Hall, p. 213, ante.

Lummon vein. The accompanying map gives the general location of the two claims, and all details of description which need be considered in this opinion:



By way of explanation of the map, it may be stated that the line, E, C, D, is the dividing line between the two claims. The line marked "133-foot plane" is a projected line plane parallel to the southerly line of the St. Louis claim, and 133 feet southerly from the point, C, on the line, C, E. The line marked "108-foot plane" is a similar plane 108 feet from the said point, C, and the line marked "520-foot plane" is a similar plane 520 feet southerly from the northeasterly corner of the St. Louis claim on the line, D, C. The strip of land included within A, B, C, E, is a strip 30 feet wide, called in the record the 30-foot or compromise strip. The arrows show the direction of the dip of the vein to be eastwardly, and underneath the Nine Hour claim. The Discovery vein is not shown upon the map, but it is established by the evidence to have a northeasterly and southwesterly trend, following generally the length of the claim as located. As to the Drum Lummon vein, there is a discrepancy between the complaint and the evidence. The complaint alleges that it enters the easterly line of the St. Louis claim at the point, H, or the 520-foot plane, and departs from the claim at the 133-foot plane at F. The evidence shows a different state of facts, to the extent that it appears therefrom that more of the Drum Lummon vein is within the St. Louis claim to the north, and that the foot wall does not pass out of the St. Louis claim until a considerable distance southerly of the 133-foot plane, if it does at all. But the case will be considered as if the vein were located according to the allegations of the complaint (and the map so shows it), as the assignments of error herein are based upon such an assumed state of facts. Upon the trial of the cause, the plaintiff in error claimed the right to pursue the Drum Lummon vein extralaterally so long as any part of the apex of the vein was within the boundaries of the St. Louis claim. The defendant in error denied this right in toto, basing such denial upon the following state of facts: When the predecessors in interest of the plaintiff in error applied for a patent to the St. Louis ground, they included the so-called 30-foot strip shown upon the map in the claim. The owners of the Nine Hour claim opposed the issuance of the patent so far as this strip was concerned, asserting that it was a part of the Nine Hour claim. A compromise was entered into, by which the owners of the St. Louis claim agreed to convey to the owners of the Nine Hour claim, upon their receiving a patent, the said 30-foot strip; and this was afterwards done, after suit had been brought for specific performance of the contract. The defendant in error claimed that by this deed, owing to its language and

the nature of the transactions leading up to it, the plaintiff in error was foreclosed of the right to pursue the Drum Lummon vein under the said 30-foot strip. The trial court permitted evidence of the value of ores alleged to be appropriated by the defendant in error from the vein as it passed under the Nine Hour claim and the 30-foot strip, between the 520-foot plane and the 108-foot plane, to go to the jury, and charged the jury that the effect of the proceedings had was to make the 30-foot strip a part of the original Nine Hour claim, and that the defendant in error had the same rights therein, and no further rights, than as if it had been originally patented as a part of the Nine Hour claim, and further charged the jury that the line, E, C, was a side line common to the two claims, and that, so long as the Drum Lummon vein apexed entirely within the St. Louis claim, the plaintiff in error could follow it in its dip under the Nine Hour claim, including the 30-foot strip. Upon this the jury rendered a verdict in favor of the plaintiff in error for the sum of $23,209. A writ of error was sued out by the defendant in error to this court, and this court, in Montana Min. Co. v. St. Louis Min. & Mill. Co. (C. C. A.) 102 Fed. 430, sustained the lower court upon these propositions as submitted to the jury, holding the line, E, C, D, as shown upon the map, to be a boundary line between the two claims and a side line of each claim, and granting the plaintiff in error here the right of lateral pursuit under both the 30-foot strip and the remainder of the Nine Hour claim. Hence in this opinion the 30-foot strip will not be treated separately, but will be regarded as part and parcel of the Nine Hour claim. Upon the trial, however, the plaintiff in error further offered evidence to show the value of ores alleged to have been appropriated by the defendant in error, contained in the said Drum Lummon vein between the 108-foot plane and the 133-foot plane. This offer was made —First, as to the portion of the vein between said planes underneath the 30-foot strip; and, secondly, as to the portion thereof under the Nine Hour claim to the easterly of the 30-foot strip. But, for the purpose of applying the principles of law which will control here, these two offers may be considered as one, in accordance with the decision in 102 Fed. 430, supra. The court sustained objections to the evidence offered, and, upon assignments of error based upon these rulings, the case is now before this court.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above).—The assignments of error raise but one question which need now be passed upon, all others having been adjudicated, upon the writ of error of the defendant in error herein, in the case of Montana Min. Co. v. St. Louis Min. & Mill. Co. (C. C. A.) 102 Fed. 430. The question for present consideration is: When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts. But while it is not entirely free from difficulty, the application of well-established principles of law thereto should conclusively determine the question. Two important elements enter into the consideration of mining rights: First, the surface boundaries, defining the rights acquired by reason of a vein or veins apexing within such boundaries; and, second, the extent of underlying mineral deposits attaching to such surface rights.

The defendant in error contends that it is entitled to the vein in its entirety in depth to the easterly of a vertical plane drawn through the line, E, C, upon the theory that the said line is an end line so far as the Drum Lummon vein is concerned, or, if it be determined that the line, E, C, is a side line, that it is entitled to the entire vein in depth to the southerly of the 108-foot plane.

As to the first contention, it is a well-settled proposition that a mining claim can have but two end lines, and that, end lines having been once established, they become the end lines for all veins found within the surface boundaries. Iron Silver Min. Co. v. Elgin Min. & Smelt. Co., 118 U. S. 196, 207, 6 Sup. Ct. 1177, 30 L. Ed. 98; Walrath v. Champion Min. Co., 171 U. S. 293, 307, 18 Sup. Ct. 909, 43 L. Ed. 170. This court has already determined that the line, E, C, D, is a side line common to the two claims (102 Fed. 430), and therefore it cannot be considered an end line for the Drum Lummon vein.

The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides:

"The locator of a mining location * * * shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

The defendant in error maintains that the words "top or apex" cannot be construed to mean "top or apex or any part thereof," and that, under the strict construction necessary, extralateral rights would not follow when the whole of the apex was not within the surface lines. If this be the correct view of the language of the statute, manifestly neither party herein would be entitled to pursue the vein in depth between the 108-foot plane and the 133-foot plane, since the apex of the vein between those points, while crossing the side line, is not wholly within either claim. For the purposes of illustration, suppose the vein were regular and vertical for the 25 feet between the two planes mentioned, crossing the side line at the same angle. The boundary rights between the parties could not then be determined by the application of a vertical plane extending to the center of the earth along the side line, and 25 feet in horizontal width, since that would be constructing an end line to that extent, and there is no authority in the statute or in the decisions for any such action. It might be said that the vein could equitably be cut by a plane parallel with and midway between the 108 and 133-foot planes, thus bisecting the portion of the vein in controversy, and giving half of the disputed ground to each claim. But neither is there any authority for such a determination by the court. It would seem, therefore, that by some rule the entire 25 feet should be construed to apex in one of the locations. And as, where the rights of two mining locators are apparently equal with

respect to mining ground, the element of priority of location is controlling, preference being generally given to the senior locator (Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 484, 7 Sup. Ct. 1356, 30 L. Ed. 1140), the entire vein would be given to plaintiff in error. If this be the true doctrine when a vein is vertical, why should there be any change in its application when the vein dips? The right of lateral pursuit is a right conferred by statute. It does not depend upon circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, save that it ceases when and at the point that it interferes with the statutory rights of another. In other words, the determination of a rule, and its application to the case before the court, should be the same whether the vein dips towards the junior location or towards the senior location, or does not dip at all. The defendant in error, in support of its contention that the right of extralateral pursuit only remains so long as the entire vein is within the claim, cites the case of Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, the decision in which was affirmed by the supreme court of the United States. 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87. But the question here involved was not there considered. It appears that in that case no attention was given to the width of the vein, its crossing of the side line being regarded merely as a point. No mention whatever was made of the width of the vein or of its apex. Reference is also made by the defendant in error to adjudications upon the class of veins called "split veins." But the case under review does not involve a split vein, and a different principle must apply. If, then, in construction of law the vein for the 25 feet in controversy must be either upon the one location or the other, and if the senior locator has priority of title, it would follow that the right of lateral pursuit would remain with the senior locator within a plane parallel to the end line of the senior claim, and up to the point of departure of the apex, or in this case the footwall. It may be said that the application of this rule will sometimes work hardship. It is true that hypothetical cases may be assumed, which, as individual types, may present difficulties in equitable adjudication. But the application of principles sanctioned by judicial authority furnishes the most effective solution of such problems, and will undoubtedly reduce the seeming inequities to a minimum.

Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side lines. It follows that the court below erred in its refusal to admit the evidence offered as to the value of ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot

planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated.[21]

Ross, Circuit Judge.—I dissent. The case of Montana Min. Co. v. St. Louis Min. & Mill. Co. (C. C. A.) 102 Fed. 430, referred to in the foregoing opinion, affirmed the existence of extralateral rights in respect to a vein that enters and departs from a side line only of a mining claim, and the judgment in the present case affirms such right on the authority of the decision in the former case. Yet in neither is the point at all discussed by the court, and in the opinion in the former case there is not a word said from which it can be seen that any such point was presented for decision. 102 Fed. 430. The importance of the question, not only to the correct determination of the present case, but in respect to other mining claims, is too manifest to require comment. In the former case a petition for rehearing is now pending, and I think it should be granted, and that case, together with the present one, set down for reargument, to the end that the question as to whether any extralateral rights exist in respect to any vein that enters and departs from a side line, only, be discussed by counsel, and fully considered by the court, before final determination.

AJAX GOLD MIN. CO. v. HILKEY ET AL.

1903. SUPREME COURT OF COLORADO. 31 Colo. 131, 72 Pac. 447.

ACTION by the Ajax Gold Mining Company against E. J. Hilkey and others. From a judgment for defendants, plaintiff appeals. Reversed.

CAMPBELL, C. J.—This is an action by the owner of the Victor Consolidated against the owner of the Triumph mining claim to recover for the value of ores taken from a vein within the limits of the Triumph lode, of which both parties assert ownership. The defendants say the ores belong to them, because the vein from which they were extracted is within the outer boundaries of their location, while plaintiff's ownership is based upon an apex right, under section 2322, Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1425].

Only one important question is raised by the appeal of the apex claimant, who failed below, and this arises out of the following instruction given to the jury at the instance of the defendants: "If you believe from the evidence in this case that the discovery lode

[21] See Costigan, Mining Law, 433. See an article by Judge John B. Clayberg, on "What Questions of Mining Law Have Been Decided in the Litigation over the Drum Lummon Lode or Vein" in 20 Yale Law Journal 191.

of the Victor Consolidated claim passes out of either side line of that claim before reaching the northerly end line of said claim, as originally located, then the rights of the plaintiff to any ore outside the surface boundaries of said claim in any vein having its apex within such claim are limited to two parallel bounding planes, one drawn through the southerly end line of said Victor Consolidated claim as originally located, and the other passing through the said claim parallel to said southerly end line at the point where such discovery vein may have been shown to depart from its side lines, if such departure has been shown." Both parties agree that by it the jury were, in effect, told that, if the discovery vein of a lode mining claim on its strike departs through a side line, no extralateral rights attach to any other vein apexing within the claim beyond the point of such departure. The question thus presented seems not to have been expressly determined by the Supreme Court of the United States or any of the inferior federal or state courts. In the absence of any decision at all construing the act of Congress, we would not have much, if any, doubt as to its meaning. Its language is broad enough to sustain appellant's contention that the owner of a lode mining claim has extralateral rights in and to all veins the top or apex of which lies within its surface lines extending downward vertically to the extent, at least, of the length of the apex within such boundaries, even though the discovery vein on its strike does not cross both end lines; for the statute provides that owners of such claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges, may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The only express limitation to this comprehensive grant is found in the proviso of the same section, which declares that the right of possession to such outside parts of veins "shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." There does not seem to be anything ambiguous or uncertain in this language, and, indeed, appellees' counsel are disposed to concede that, taken literally, it affords some warrant, at least, for appellant's position; but they say that by numerous decisions construing the statute the courts have enunciated several propositions that somewhat restrict its apparent scope. Appellees' position cannot be better presented than in the language of their learned counsel, and a statement of their propositions serves to bring out sharply the respective contentions so ably argued

on both sides. The following map will also aid in an understanding of the controversy:

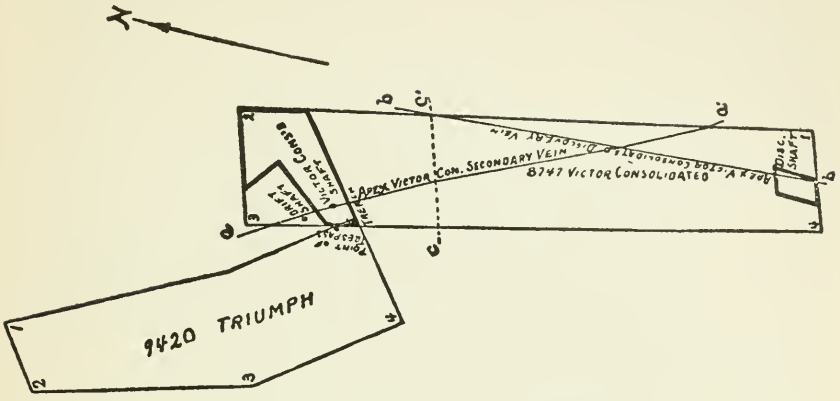


FIG. 2

The apex of the discovery vein of the Victor Consolidated is represented by b, b′. It enters the claim at the south end line, and its course in the main runs parallel with the claim as surveyed, but passes out through the east side line about 1,000 feet from the south end line, a, a′, is the vein which, as contradistinguished from the discovery vein, we call the "secondary vein," which the evidence tended to show passes diagonally across the location, entering it through the west, and leaving it through the east, side line. The Triumph claim is correctly delineated on the map. If the ore taken from the underground workings of the Triumph was taken from any vein apexing within the Victor Consolidated—as some of the evidence tended to show—it was from this so-called secondary vein. Stating the contention again in a concrete form, the jury were told if the discovery vein of the Victor Consolidated crossed the east side line at c′, then the rights of the plaintiff to ore outside of its surface boundaries in any vein having its apex therein is limited to two parallel bounding planes, one drawn through the south end line, 1, 4, of the location, as originally established, and the other passing through the claim at the point where the discovery vein leaves the east end line, and parallel to the south end line at c, c′. The north end line, or bounding plane, of this right, is the dotted line c, c′, and the south bounding plane the south end line of the location, 1, 4. Plaintiff's extralateral rights as to all veins within the surface lines were, by this instruction, restricted to that part of the claim south of the line, c, c′, and in that part between this line and the north end line of the claim he was given none whatever, though about 500 feet of the apex of the secondary vein was found in this latter segment.

The three propositions of law said to be established by the decisions, of which the fourth one stated by appellees is said to be a necessary corollary, are: (1) There can be but one set of end lines or bounding planes for a single location, and these limit the extralateral right upon all lodes or veins apexing therein. (2) These end line or bounding planes are determined by the strike of the discovery vein with reference to the located side and end lines of the claim. (3) Where the apex of the discovery vein passes through one end and one side line, the extralateral right upon such vein will be bounded by a vertical plane drawn downward through the crossed end line, and another vertical plane parallel thereto, but operating at the point where the apex leaves the side line. The fourth proposition they thus express: "The necessary, logical sequence of these propositions is that, where the discovery vein on its strike departs through a side line, no extralateral rights attach to any other vein apexing within the claim beyond the point of such departure."

Since appellant concedes the first three propositions, there is no necessity for discussing them, or citing the authorities upon which they rest. But the alleged deduction therefrom appellant vigorously combats, and that presents the question for our decision. We first observe that that part of appellees' argument to the effect that where a location is laid across, instead of along, the discovery vein, the end lines become the side lines of the location, and the side lines become the end lines, is not pertinent to anything now before us, and, in so far as the deduction depends on such proposition, it is without support. There is no dispute between counsel as to this doctrine of shifting of side and end lines in the case supposed, but it is wholly inapplicable here, for the Victor Consolidated location is laid along the course of the discovery vein, and this vein enters the claim through the south end line, and passes out under the east side line. Besides this, the location is patented, and there is authority for saying that its end lines, as chosen by the locator and described by the patent, are, for all purposes and under all circumstances, to be taken as the fixed end lines.

But conceding the correctness of all three propositions, as to which the counsel upon both sides are in accord, we cannot agree with learned counsel for appellees in their ingenious argument that the fourth proposition, which they must establish in order to sustain the instruction complained of, is a logical sequence of either or all of the others. It is quite true that there can be but one set of end lines for one location, and these must perform that function not only for the discovery vein, but for all other veins apexing within the surface lines. Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Walrath v. Champion Mining Co., 171 U. S. 293, 297, 308, 18 Sup. Ct. 909, 43 L. Ed. 170. This, however, does not mean that all such veins have exactly the same extralateral rights, nor can it be said that only so

much of a secondary vein as apexes within that part of the claim where the apex of the discovery vein is found has such rights. In the Walrath Case, supra, which was twice before the Circuit Court of Appeals (63 Fed. 552, 19 C. C. A. 323, 72 Fed. 978) and once before the Supreme Court of the United States, there are some expressions in the opinions of the Circuit Court of Appeals from which, taken alone, it might be inferred that under facts like those here present the owner of a claim would have extralateral rights in the discovery vein even beyond the point where, on its strike, it leaves the side line; and that the bounding planes, within which such rights are to be exercised, must be drawn through the two end lines. But appellant makes no such contention here, and is content with extralateral rights in the discovery vein only up to the point of its departure from the east side line, so that, for our present argument, we assume that to be the true doctrine. The end lines constitute a barrier, beyond which a locator cannot follow a vein on its strike, whether it be a discovery or secondary vein; and they also limit the bounding planes within which his extralateral rights are to be exercised in following such vein on its dip. In exercising such extralateral rights, the locator cannot, in any case, pursue the vein on its dip beyond the bounding planes drawn through the end lines; but, as we have said, appellant is content to be restricted in the exercise of such rights in the secondary vein to planes drawn parallel to the end lines, and passing, the one through the claim at the point where the vein enters, and the other where it departs from, the surface line of the location. The extent of the right depends upon the length of the apex, and the extralateral rights are measured not necessarily by the end lines—and only so when the vein passes across both end lines—but by bounding planes drawn parallel to the end lines passing through the claim at the points where it enters into and departs from the same. It would seem, therefore, necessarily to follow that the extralateral right depends, inter alia, upon the extent of the apex within the surface lines, and, while the end lines of the claim as fixed by the location are the end lines of all veins apexing within its exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downward parallel with the end lines. It makes no difference in what portion of the patented claim the apex is. Its extralateral rights, under this rule, can easily be ascertained. The apex of a secondary vein need not be in the same portion of the claim as is the apex of the discovery vein. The statute does not say so. The decisions heretofore made certainly do not so require. The three propositions deduced from these decisions do not logically lead to that doctrine. While, as we have said, there is no decision upon the exact point, yet we think there are cases, in addition to those already cited, which necessarily lead to this conclusion, among which is Cons. Wyoming G. M. Co. v. Cham-

pion M. Co. (C. C.) 63 Fed. 545, 546. While this court, in Catron v. Old, 23 Colo. 433, 48 Pac. 687, 58 Am. St. Rep. 256, criticised this case, it did not do so as to the point now under consideration. It was with reference to the doctrine of comparative direction of the lode which left to the jury, as a question of fact, whether a vein extends more along than across the claim, that the criticism went; and we there said this introduced an element of uncertainty, which, if possible, should be avoided. See, also, Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803, affirmed in 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87; Tyler M. Co. v. Last Chance M. Co. (C. C.) 71 Fed. 848; 2 Lindley on Mines, § 591 et seq.

The language of Judge Hallett, when Del Monte Case (C. C.) 66 Fed. 212, was before him, is pertinent to the argument of appellees that there can be but one set of end lines or bounding planes for all the veins covered by a single location, and that they must be the same for each. He thus disposes of it: "It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. Iron Silver Min. Co. v. Elgin Min. & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line, and, if there be magic in the word 'line,' it will be better not to use it." The opinion of Mr. Justice Brewer, when the same case came before the federal Supreme Court, is very instructive, and, as we read it, is authority for the conclusion which we have reached in the case in hand. In speaking of extralateral rights of a vein entering a claim through an end line and passing out under a side line, he said: "Given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside the vertical side lines." And referring to the proviso of section 2322, which we have hereinabove quoted, he proceeds: "This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. * * * Naming limits beyond which a grant does not go is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein whose apex is within his surface limits on its dip outside the vertical side lines, but may not, in such pursuit, go beyond the vertical end lines. And this is all that the statute provides." This reasoning applies as much to a secondary as to the discovery vein. It is a vein that apexes within the surface limits, and there is, to say the least, no more reason in denying to it extralateral rights because it does not apex within that particular part of the claim where the apex of the discovery vein is, than there

is for denying to any vein extralateral rights unless in its course it reaches the vertical planes of the end lines. Justice Brewer says this latter condition is not essential to the exercise of extralateral rights, and, a fortiori, the former is not.

Our conclusion is that for all veins, both discovery and secondary, of a patented claim, the owner has extralateral rights, at least for so much thereof as apex within the surface lines; that such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end lines of the location, as fixed and described in the patent, are the end lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end lines, need not be coincident. The giving of this instruction was prejudicial error. The judgment is therefore reversed, and the cause remanded.

Reversed.[22]

JEFFERSON MIN. CO. v. ANCHORIA-LELAND MIN. & MILL. CO.

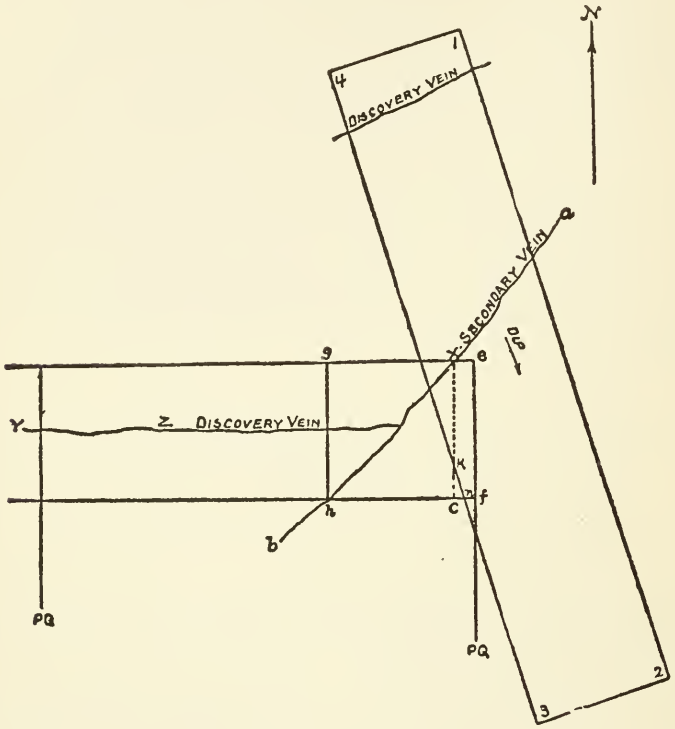
1904. Supreme Court of Colorado. 32 Colo. 176, 75 Pac. 1070.

Action by the Anchoria-Leland Mining & Milling Company against the Jefferson Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The Anchor and the Mattie L. are both patented lode mining claims, and, as originally located, overlapped on the surface, as shown by the accompanying diagram. The appellee, plaintiff below, the Anchoria-Leland Mining & Milling Company, is the owner of the Anchor, and the Jefferson Mining Company, appellant and defendant below, owns the Mattie L. claim. The Anchor went first to patent October 5, 1894, without adverse or protest by the owners of the Mattie L., and the patent includes the entire surface in conflict. A patent was issued for the Mattie L. November 3, 1896, in which the conflicting surface ground is expressly excepted from the grant. The Mattie L. as actually located is across, instead of along, the course of the discovery vein, as subsequent developments of the claim show, so that what its locators believed to be, and so designated as, its end lines are in law its side lines, and its side lines are its end lines, so far as concerns extralateral rights. The Anchor

[22] See Costigan, Mining Law, 443–444.

location was along the course of its discovery vein, so that its located end lines are the legal end lines for all veins that have their apex within its boundaries. The relative positions of the two locations, and the patented area of each, and the segment of the vein in controversy, are shown with sufficient accuracy by the following diagram:



There is no material conflict in the testimony. The case was tried by the court without a jury, upon an agreed statement of facts, which was supplemented by documentary evidence and oral testimony produced by both parties. From the agreed statement, in addition to the facts already recited, it appears that what is called in the record a secondary vein, as distinguished from the discovery vein, and delineated on the diagram as a–b, enters the exterior boundaries of the Mattie L. across the easterly boundary line thereof about 510 feet southerly from corner No. 1 of that location, and thence continues, substantially parallel with the discovery vein (which is near the northern boundary), on a southwesterly course across its patented surface, and thence across the Anchor claim, entering it at the north, and departing from it at the south side line.

This vein has a dip to the southeast, and the ore in controversy is situated in that segment of the vein, a–b, under the surface of the Anchor claim, and within vertical planes drawn downwards through its side and end lines.

This vein, a–b, has a portion of its apex within the patented surface of each, and the outcrop appears throughout its entire course across both of the locations. In following this vein on its dip the owners of the Mattie L. (the Jefferson Mining Company) ran a drift under the north side line of the Anchor lode, and within the parallelogram, c, x, e, f, in which are found the ore bodies in controversy, and began to extract and remove ore from such segment of the vein; whereupon this action was brought by the Anchoria Company, as the owner of the Anchor claim, to restrain the Jefferson Company, the owner of the Mattie L., from continuing such work. Further reference is made in the opinion to the evidence introduced by both parties supplementing the agreed statement of facts.

The court made findings of fact in favor of the plaintiff company, establishing the seniority of the Anchor claim, and permanently enjoined defendant from removing any ore lying beneath the surface of the Anchor claim and within vertical planes drawn downwards through its side lines and end lines.

CAMPBELL, J. (after stating the facts).—The positions taken by the parties may thus be stated: Appellant's contentions are, first, that, in law and in fact, the Mattie L. is senior to the Anchor, and therefore entitled to the ore in controversy because of its priority under the doctrine governing its intraliminal rights; second, that, regardless of the question of seniority, as to the secondary vein, a–b, the Mattie L. has extralateral rights southerly on the dip of that vein between what its locators considered its parallel side lines, but which in law are parallel end lines, and this covers the segment in dispute; third, that the Anchor claim, although it has within its exterior boundaries a portion of the apex of this particular vein, is not entitled to the ore in controversy within the parallelogram, c, x, e, f, but the same belongs to the Jefferson Mining Company, the owner of the apex of the vein, a–b, northeasterly from x. Each of these propositions is controverted by appellee, and we shall discuss them, but not in the order pursued by counsel in their briefs.

It is to be observed again that a–b is not the discovery vein of either location, but the parties seem to agree that, under the facts of this case, their respective rights thereto, whether intraliminal or extralateral, are not different from what they would be were both locations based upon it as such.

1. In one branch of the argument of appellant's learned counsel they say that the question as to which is the senior location is the vital one in the case. This is so because there are surface outcroppings of the same vein within the boundaries of two lode mining claims which conflict on the surface. In such circumstances appel-

lant asserts, and appellee concedes, that the claim first located necessarily carries the right to work the vein, and they both cite and rely upon: Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; Tyler M. Co. v. Sweeney, 54 Fed. 284, 4 C. C. A. 329; Last Chance M. Co. v. Tyler M. Co, 61 Fed. 557, 9 C. C. A. 613, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Tyler M. Co. v. Sweeney, 79 Fed. 277, 279, 24 C. C. A. 578.

In the last case it was said that the ore body in dispute is on the dip of the lode or vein within the extended vertical planes of the end lines of the Tyler claim, and also within the side lines of the Last Chance claim, and on the dip of the vein as it passed through that claim, and it was there said that "the question as to which claim was first located necessarily determines the rights of the respective parties." Applying this principle to the present case concretely, it may be said that the ore in controversy here is on the dip of the lode, a–b, between the extended vertical planes of the legal end lines of the Mattie L. claim. It is also within the side lines of the Anchor claim, and on the dip of the vein as it passes through that claim. If the reasoning and conclusion in the Tyler-Sweeney Case, supra, are right—and both parties here agree that they are—then it seems logically to follow that the senior location is entitled to the ore in controversy. It may be that the facts of this case differentiate it from those cited, and that the principle therein established does not apply here. And while it may not be necessary for us to rest our decision solely upon the question as to the seniority of the respective locations, yet, as both parties deem it vital, we first inquire which is the older location?

These claims overlap on the surface. The Anchor applied for, and first received, its patent, and no protest or adverse was made thereto by the owners of the Mattie L. The United States statute governing such applications provides for ample notice, which is equivalent to a summons in a judicial proceeding, and he who fails to heed it has no right to complain that his rights are concluded by it, and if, in such a case, a patent is issued in pursuance of an application regularly made, all persons are concluded. Had the owners of the Mattie L. protested the application for patent of the Anchor, and brought their suit in support of such adverse claim, and the judgment of the court in which the suit was pending had been in favor of the Anchor, this would have been a conclusive determination that the latter is the senior location. Such a judgment of the court would be no more conclusive than the determination by the officers of the land department, in the absence of such protest, that the Anchor was entitled to a patent for all of the territory within its surface boundaries, including the strip covered by both locations. Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Bunker Hill, etc., M. & C. Co. v. Empire State, etc., Co., 109 Fed. 538, 48 C. C. A. 665. It may be true, as appellant contends, that, to protect

the apex rights of such subsequent locator, no protest is necessary where the junior location is made on the apex of a vein on the dip of which the senior patented location is based, and there is no surface conflict; but in this case the Anchor senior location has a portion of the apex of the same vein, and there was a conflict in the surface between the two locations, and the rule invoked by both parties is applicable to the present case.

Upon the trial, however, appellant, over the objection of appellee, was permitted to go behind the patents to introduce evidence upon the question of the date of the location of the respective claims, since the patents on their face do not disclose the dates of such location, and to rebut this testimony appellee introduced oral testimony. Appellant, therefore, cannot complain if from this showing, as well as from the adjudication of the officers of the land department in granting a patent to the Anchor claim, which we hold conclusive, it appears that the Anchor is the senior location. It was a perfected mining location not later than the 10th of September, 1891, and the Mattie L. does not relate back further than the 14th of October of the same year, because it did not have a valid discovery until that time, and until after the location of the Anchor was made. It is true that the trial court disregarded all the evidence, documentary and oral, produced at the trial, with respect to the date of location of these claims, except that pertaining to the patents themselves, apparently basing its decision solely upon the effect of the patent proceedings; but if the other evidence admitted, but not considered, is competent or material to the issue of priority, it quite conclusively shows the seniority of the Anchor location. The complaint of appellant that the trial court improperly refused to grant it a new trial on the ground of surprise in the attack made by appellee upon the discovery of the Mattie L., if at all important here, is wholly untenable for the reason that the proof as to the alleged surprise is altogether insufficient under our practice; and, even if appellant were surprised, there is no showing that, in case of a second trial, it would be able to fortify or strengthen its case as made upon the first.

2. The second contention of appellant is that if the seniority of the Anchor claim be admitted, nevertheless the ore body in dispute belongs to the Mattie L. This is the argument: The discovery vein of the Anchor crosses both end lines of that location. Its dip right thereon is to follow the vein at right angles to the side lines, and its owner may not follow any vein, either discovery or secondary, on the dip at any other angle. Referring again to the diagram, counsel say that the owner of the Anchor may follow the discovery vein, y–z, wherever found within the exterior lines of the survey, and upon its dip between the planes, PQ, being the planes of the end lines, and may follow the secondary vein, a–b, between vertical planes drawn, parallel to the planes of the end lines, at the points x and h, where

the vein a–b departs from the side lines of the location, and within such planes, represented by the parallelogram, x, c, h, g, may follow the vein, a–b, to its south side line, either on its strike or dip, at any point west of x, but may not follow it east of x, because the apex of the vein, a–b, between x and a, belongs to the owner of the Mattie L. claim, which by its patent has the right to follow such vein on its dip between vertical planes drawn parallel to and coincident with the legal end lines (that is, the located side lines) of the Mattie L. location, and this includes the vein under the surface of the Anchor within the parallelogram, c, x, e, f.

It is now settled law that the legal end lines of the original or discovery vein are the end lines of all veins within the surface boundaries with respect to extralateral rights. While appellant expressly disclaims that the present case involves the doctrine of extralateral rights, nevertheless in argument its counsel virtually asks to have the principle of that rule applied to the facts. That doctrine does not fit the facts of the case, for the legal question is one strictly of intraliminal rights. Neither can we, by analogy, apply to the facts the principles of that doctrine, as we proceed to show.

The ore bodies in dispute within the parallelogram, c, x, e, f, except the triangle, k, c, n, to which appellant can make no claim, are within the surface lines of the Mattie L., and the entire parallelogram is wholly within the surface lines of the Anchor. The doctrine of extralateral rights refers to that part of a vein which, on the dip, lies outside of the side lines of the location within whose surface lines the apex of the vein appears, and not to any part of such vein, either the outcrop or segments on the dip thereof, which lie wholly within planes drawn downwards coincident with its surface boundaries. In other words, the extralateral rights of a locator of a lode mining claim do not attach until after, in pursuit of his vein on its dip, he crosses the side lines of his location. Here, as we have said, in pursuing the vein, a–b, from its apex, which is within the surface lines of the Mattie L., thence downward on its dip, its owner has encountered a segment thereof inside the side lines, and also the end lines, of the Mattie L., which is also within the surface lines of the senior Anchor location. This segment, too, has a part of the apex of the same vein within the surface boundaries of the Anchor. It will not do to say that such segment is outside of the side lines of the Mattie L., because it is also within the boundaries of the senior Anchor, and, though the Mattie L. does not own the conflicting ground, still this very ground is actually physically within its surface boundaries. The fact that it belongs to another person, and is within the surface boundaries of another location, does not change its position on the ground with reference to legal boundary lines of the respective locations.

To make the point, if possible, still clearer, suppose that the Mattie

L. patent had included all the ground which its original survey encompassed. This would embrace the strip in dispute patented by the Anchor. In other words, suppose the Anchor was out of the case entirely, and we were required to ascertain the nature and extent of the rights of the Mattie L. to all the veins found within its surface lines. On the assumption that it has the apex of the vein, a–b, then the rights of the locator are defined by section 2322, Rev. St. [U. S. Comp. St. 1901, p. 1425]. The property rights conferred by a lode location thereunder are twofold (1 Lindley on Mines [2d Ed.] § 549), intraliminal, and extraliminal or extralateral. The first embraces all within its boundaries down to the center of the earth; the second, while depending for its existence upon something within such boundaries, may nevertheless be exercised, under certain conditions, beyond those boundaries. Now, the segment of the vein in dispute here is wholly within the surface lines of the Mattie L. as they were run upon the ground. The property rights of the owner thereto are therefore strictly intraliminal, and in no sense referable to the law governing property rights of the second class. There would seem to be no doubt of this conclusion in the hypothetical case. Instead of the supposed case, however, we have one where two locations cover the same ground, and where the strip common to both is expressly excepted from the Mattie L. patent because it had been previously segregated from the public domain and conveyed by the United States to the owner of the older Anchor location. Neither this exclusion from the Mattie L. patent of the disputed strip, nor the projection of the Anchor into its territory, nor both combined, operate to change the boundary lines of the Mattie L. location. They are still to be traced on the ground as they were first run, and the ground in controversy is just as much within the existing surface lines, both side lines and end lines, of the Mattie L. as when such lines were first laid. Manifestly, therefore, now, as always, whatever property rights, if any, which the owner of the Mattie L. has in the veins found in this particular area, are derived, and must spring, from section 2322 of the Revised Statutes [U. S. Comp. St. 1901, p. 1425], and that section confers no right whatever if such ground has been previously patented to another.

It is not logical to hold that the extralateral rights with respect to this disputed strip are to be defined as though it was territory beyond the Mattie L. side lines, and within the planes of its end lines, when it so clearly appears that it is wholly within the surface lines of that claim, though covered by a senior conflicting location. The law does not require that the bounding lines of a location be laid wholly upon its own territory, and so as to include only the surface ground actually belonging to it, but they may be laid along or across other and senior locations belonging to another, though, of course, the prior rights of the latter may not thereby be injuriously affected. The

courts cannot make a location or change the boundaries as made by the locator himself. But if the Mattie L. was permitted to draw in its boundaries so as to include therein only the ground actually belonging to that location, and so as to exclude all that belonging to the Anchor, the position of the appellant would not be strengthened. On the contrary, it would be left without the vestige of an extralateral right. For then the westerly legal end line (the located westerly side line) of the Mattie L. would be coincident with the northerly side line, the easterly end line, and the southerly side line of the Anchor claim for a certain distance, and thus would be not a straight, but a broken, line, and the westerly end line of the location, as thus laid, would not be parallel with its easterly legal end line, and from a claim thus irregularly located extralateral rights are withheld. The law is that it is the end lines alone, not they and some other lines, which define the extralateral right, and they must be straight lines, not broken or curved ones. Walrath v. Champion Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

To hold that the disputed strip is, legally speaking, outside the side lines of the Mattie L. location, would be not only contrary to the physical fact, but would be putting a premium on an unlawful act. It is clear that if the locators of the Mattie L. had observed the statute, and not attempted to include within their location previously located ground, and had so drawn its westerly legal end line as to take in only public domain, it would have acquired, by such compliance with the law, no right whatever to the ore bodies now claimed. And while, if the Anchor owner made no objection, the boundary lines of the Mattie L. might be laid on the surface of the Anchor, still the latter's superior right might not thereby be jeopardized. In neither of these cases could extralateral rights be asserted. Can it be said that, because the Mattie L. has so run its surface lines as to include therein property already located by another, that it thereby has enlarged its rights beyond what it would have secured had it obeyed the provisions of the statute under which its rights are obtained, and by which they are defined? In other words, may a locator of a mining claim acquire greater rights by disobeying, than by observing, the statutes of the United States, from which all his rights are derived? Until a higher authority so commands, we shall not so decide.

Extralateral rights, as to the ore bodies in dispute, might be exercised if they are outside the side lines of the Mattie L. But this situation can exist only if its westerly legal end line be drawn in to exclude the conflicting territory. In that event, appellant may not go westerly beyond that boundary, for it could not, in pursuing its vein on the dip, pass beyond the planes drawn vertically through the end lines of its location. Such planes would constitute a barrier beyond which the owner of the Mattie L. could not go, and would exclude

from the exercise of its extralateral right the easterly portion of the Anchor claim which is here in controversy.

The doctrine of extralateral rights, therefore, does not apply; neither does it by analogy fit this case. The intraliminal rights of the respective parties govern, and since those rights of the junior Mattie L. claim conflict with, and are interrupted by, the senior intraliminal rights of the Anchor, the latter prevails, as we have hereinabove said in discussing another contention of appellant.

Counsel rely chiefly upon Colo. Cent. M. Co. v. Turck, 54 Fed. 262, 4 C. C. A. 313, wherein it was said that, where the apex of a vein passes out of the side line of a claim into an adjoining claim, the latter, though junior in date, gives to its owner the right to follow the vein on its dip underneath the senior location. That is the case most nearly in point, but it does not, in our judgment, apply to the facts of this case. Here in the case at bar the segment of the vein claimed by appellant has not on its dip passed out of the side line of the Mattie L. claim, but is wholly within its surface boundaries. In the Turck Case the Circuit Court of Appeals did not deny to a senior location so much of the vein underground as it had the apex of. That decision, as we understand it, so far as it is analogous to this case, was that one who locates upon the apex of a lode may, within planes drawn through the end lines of the location, follow the vein outside of its side lines, and underneath the boundary lines of an adjoining proprietor, when the latter has no part of the apex, though he holds under a senior patent. But here, as we have said, the vein has not on its dip passed beyond the side lines of the junior Mattie L. location, but the ore body in question is wholly within the surface lines of the junior Mattie L., and also inside the surface lines of the senior Anchor, location. Necessarily, therefore, it seems to us that the senior claim has the right to it.

A fundamental error of appellant consists in the attempts to apply the doctrine of extralateral rights to a case which is governed by the law of intraliminal rights; in seeking to apply the limitations which are applicable to outside parts of veins—that is, veins outside the side lines—to the parts of veins wholly within such lines. This we believe is contrary to section 2322, and opposed to the authorities hereinabove cited. Appellee is not here asserting extralateral rights to the secondary vein, but bases its claims thereto solely on the ground that it is the owner of the senior location, and for that reason owns the ore found within its surface boundaries.

But if the doctrine of extralateral rights does govern, then by the decision in Walrath v. Champion Co., 72 Fed. 978, 19 C. C. A. 323, the end lines, and no other lines, of the Anchor location bound its extralateral rights in the vein, a–b; hence the owner of the Anchor would be entitled to all ores of such vein found within planes drawn downward through its end lines, PQ, and would not be limited, as is

attempted to be done here by appellant, by planes drawn parallel to the end lines at the points x and h. This case was affirmed by the Supreme Court of the United States under the same title (171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170), and as to this point was referred to with approval in Montana M. Co. v. St. Louis M. & M. Co., 102 Fed. 430, 42 C. C. A. 415. We are aware that considerable criticism has been made of this decision. In Ajax G. M. Co. v. Hiley (Colo. Sup.) 72 Pac. 447, 62 L. R. A. 555, we decided that planes drawn parallel with the end lines, and at points where the vein passed through the side lines of a location, bounded the extralateral rights. We so limited the rule because that was the extent of the claim made by the owner of the extralateral rights. But the Supreme Court of the United States has gone further, and said that these bounding planes must be coincident with the planes of the end lines, and if this case demanded the application of that rule it would be our duty to follow it if we believed the facts of this case are such as to bring it within the principle there announced, notwithstanding the adverse criticism of the decision by the learned author of Lindley on Mines (2d Ed.) § 593 et seq. Its application would give the ore bodies in dispute here to the Anchor claim as the owner of the senior extralateral right.

Our conclusion is that where there are two conflicting lode locations, each having a portion of the apex of the same vein, and there is a conflict, as here, with respect to the dip rights within the surface lines of the two locations, the senior location must prevail.

To avoid, if possible, misunderstanding, we further observe that in this case a portion of the secondary vein, a–b, is within the surface boundaries of the senior Anchor lode, as the stipulated facts show. The owner of that claim, to say the least, certainly owns all the mineral of such vein within planes extended vertically downwards coincident with its end lines and side lines to the extent, at least, of the length of the apex found within its surface boundaries. The case has not been argued, certainly not exclusively, upon the proposition that each of these parties owns a definite portion of the ore found within the parallelogram, c, f, e, x, to each belonging such part of the vein as it has the apex of, but, if it had been, there is not sufficient data in the record to show what portion, or how much, each party is entitled to, even if we should hold that the Mattie L. owns such portion of the ores within that parallelogram as it has the apex of easterly of x. The case has been submitted rather upon the proposition that each party owns all the ores found within this parallelogram.

In thus disposing of this action, we have not overlooked, though we do not pass upon, the contention of appellee that the Mattie L. can, in no circumstances, have any right, intraliminal or extralateral, to the secondary vein, a–b, because it is substantially parallel with the discovery vein, and more than 300 feet distant therefrom, and under

section 2320 [U. S. Comp. St. 1901, p. 1424] such other vein is therefore excluded from the operation of the patent, though it may be within the surface lines of the claim as surveyed and located on the ground. There are other contentions by appellee which, in the view we have taken of the case, are not discussed.

In addition to the authorities already cited, we refer to the following, among others, which in principle uphold the conclusions here reached: Iron Silver Mining Co. v. Elgin M. & S. Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Del Monte M. &. M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.

The judgment of the district court being in accordance with our conclusion, it is affirmed. Affirmed.[23]

Section 5.—Cross Veins and Veins Uniting in the Dips.

FEDERAL STATUTE.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. Rev. St. U. S., § 2336.

ROXANNA GOLD MINING & TUNNELING CO. v. CONE ET AL.

1899. CIRCUIT COURT, D. COLORADO. 100 Fed. 168.

BILL to Restrain Work in a Mine.[23a]

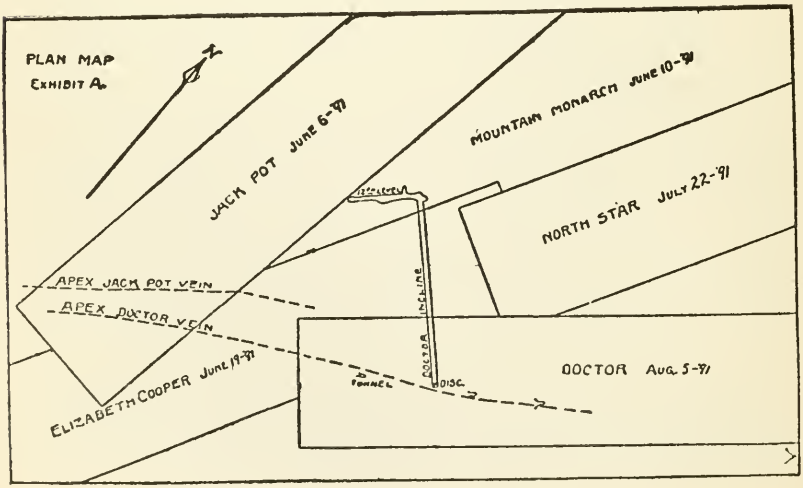
HALLETT, District Judge (orally).—This is a bill to restrain work upon a mine. The complainant charges that it owns the Mountain Monarch lode mining claim, in the Cripple Creek district, county of Teller, and that respondents are taking ore from within the surface lines at a considerable depth underground. Complainant's title to the Mountain Monarch claim is not disputed, nor is the charge denied that the respondents are removing ore from the claim. Without stating the pleadings at length, or the matters set forth in the affidavits in respect to the contentions of the parties, it appears that re-

[23] See an article on "Lode Locations" by Mr. Henry Newton Arnold in 22 Harv. Law Rev. 266, 339, where both the extralateral right and the intralimital right features of the principal case are discussed.

[23a] The map found here in the original report is inserted at the bottom of p. 544.

spondents are operating from another claim south of the complainant's claim, called the "Doctor," and that they have descended into the ground in controversy, following the Doctor vein from the Doctor location upon the dip; the lode which in the pleadings and in the affidavits is called the "Doctor" vein having a dip to the north from that location. The position of the respondents is that there is but one vein having a continuous course through the Doctor location, and that is the vein which they have followed from the Doctor location to and under the Mountain Monarch location. Complainant contends that there are two veins in that locality, one which is called the "Jack Pot" vein, and another called the "Doctor" vein, the latter being the one under which respondents claim. The Mountain Monarch and the Doctor claims are not contiguous. The two locations are some distance apart, and in the space intervening between the two locations is a claim called the "Elizabeth Cooper." According to complainant's theory, one of these veins—the Doctor vein—has an apex in the Doctor location at the point in controversy, and from the west end of that location to a distance eastward 600 feet or more. The other vein, called the "Jack Pot," has an apex north of the Doctor location, and in the territory of the Elizabeth Cooper location, at the west end line of the Doctor, which enters the Doctor location a considerable distance north of the west end line, and through the north side line of the Doctor, and passes on through that claim. Complainant has filed a map[23b] made by the surveyors, who support complainant's application with affidavits which show the location of the apex of each of these veins, the Doctor and

[23b] The following is the map referred to in the opinion:



the Jack Pot. Looking at this map, the apex of the Doctor vein crosses the west end line of the Doctor location, and passes eastward through that location. The apex of the Jack Pot vein is in the Elizabeth Cooper territory, and a little north of the Doctor location, at the west end line of that location, and enters the Doctor location a short distance east of the west end line of that location, and through the north side line. Accepting this statement of fact in respect to the position and extension of these two veins, it seems that the complainant has not the apex of the Doctor vein or of the Jack Pot vein at any point within its location.

Upon the complainant's case as presented, and without referring to the defendants' attitude in respect to the condition of things underground, these two veins coming together on their dip within the territory of the Mountain Monarch, the ore will belong in that territory to the owner of the apex of one or the other of these veins. The complainant, not asserting or claiming title through and by means of the apex of one or the other of the veins, fails to show title as to either of them. According to the complainant's statement of the position of the Jack Pot vein, the Doctor location would have no right to follow that vein into the ground in controversy. That right would be in the owners of the Elizabeth Cooper location; and the Doctor locators, the respondents in this bill, would have a right, owning the apex within their territory, to follow the vein into the ground in controversy, subject to the prior right of the Elizabeth Cooper locators, assuming that to be the older of the two locations.

In other words, upon the case as stated by the complainant, the ownership of this ore stands between the Elizabeth Cooper people and the Doctor people, and not between the complainant and the Doctor people. The existence of the Doctor vein and its continuity to the place in controversy seems not to be questioned by the complainant. Complainant relies entirely upon the circumstance, which it alleges to be true, that there are two veins in that locality which unite at the tenth level, or between the tenth and twelfth levels, in the Mountain Monarch territory. So understood, the right is not with the complainant in either case. It must be with the owners of the Elizabeth Cooper or with the owners of the Doctor claim.

In this view, I think the motion for injunction should be denied. As the circumstance of the location and situation of these veins is perhaps not very fully explained, or not as fully explained as it may be at some other time, this ruling will be subject to the right of the complainant to renew its motion, if any different condition of affairs shall be developed in the territory in controversy

On Motion for Rehearing.
(February 7, 1900.)

HALLETT, District Judge (orally).[24]—This is a bill to enjoin work in a mine. A motion for injunction was heard and denied at this term. Counsel have within a few days back reargued the questions presented in the record. In this argument it appears that the opinion rendered by the court at the first hearing was not understood by counsel. * * *

The decision of the court at the first hearing was that the complainant, not having the apex of either vein, was in no position to claim the ore in its ground, whether it should be in one vein or the other. That ruling is based upon the last clause of section 2336 of the Revised Statutes, which declares: "Where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Under this statute, it was said that the controversy must lie between the owners of the Elizabeth Cooper territory and the owners of the Doctor territory, and that would depend upon whether the one or the other was the older location, because this statute says that, in case of the union of veins in their descent into the earth, the oldest or prior location shall take the vein below the point of union. That is the matter which counsel seem not to have understood.

The last argument by complainant's counsel was directed to the question whether the Elizabeth Cooper locators could claim the ore in the Jack Pot vein because of the location of their claim in such manner that the apex must traverse the claim from side to side, and not through the end lines. That is a matter of which we are in no situation to speak. The owners of the Elizabeth Cooper claim are not parties to this suit; therefore they cannot be heard in this suit to say whether the position of the vein is here or there in their location. Whether it be true that the Elizabeth Cooper claimants may follow this vein called the "Jack Pot" into the depths of the earth, and under the Mountain Monarch location, or not, as between these parties the result is the same. If the Elizabeth Cooper people are not in a position to follow the Jack Pot vein under the Mountain Monarch location, and if that be the elder location as between that location and the Doctor location, then the Doctor location may hold the ore under that branch of the vein which outcrops in its territory. Nothing is alleged against the outcrop of the Doctor vein. It appears affirmatively in this record that it follows the course of the location across the western end line of the Doctor claim, and for 600 feet east from that point. So that the proposition declared at the first hearing is still true,—the ownership of the ore in question under the Mountain Monarch location is a matter which may be in

[24] Part of the opinion on rehearing is omitted.

issue between the Elizabeth Cooper people and the Doctor people, but no issue can be raised in respect to it by the Mountain Monarch people, from the facts as shown in this record. The motion for rehearing will be denied.

LEE ET AL. v. STAHL.

1889. SUPREME COURT OF COLORADO. 13 Colo. 174, 22 Pac. 436.

ELLIOTT, J.—Ernest Stahl, the plaintiff below, commenced this action in 1878, alleging his ownership in fee of the Lone Tree lode, and complaining that the defendants had ousted him therefrom, and still unlawfully withhold the possession thereof. The case has been several times tried in the district court, and this is the second time it has been before this court on appeal. The plaintiff's patent from the United States to the Lone Tree lode shows the date of entry at the land-office to have been April 30, 1873. Defendants' patent to the Argentine shows the date of entry to have been July 3, 1875. Defendants claim to have made the discovery and location of the Argentine in 1865, prior to the discovery and location of the Lone Tree, and to have complied with all the laws, state and federal, and all the local rules and regulations respecting such locations; and that the vein of the Argentine is the premises from which plaintiff claims to have been ousted. This claim was denied by plaintiff. The territory described in the two patents cross each other; but whether or not there is an actual crossing of the two veins within the limits where the two patents so cross each other was the principal question of fact in controversy on the trial. Defendants did not adverse plaintiff's application for a patent.

This action involves the construction of certain sections of the act of congress of May 10, 1872, relating to mineral lands of the United States, and particularly sections 3, 6, 7, 14, and 16, which are here referred to by number as they appear in the United States Revised Statutes, to-wit: Section 2322, which provides, in substance, that locators of mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on May 10, 1872, so long as they comply with the laws of the United States and with local regulations governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical

side lines of such surface locations. Also sections 2325 and 2326, which prescribe the manner in which patents may be obtained for lands containing valuable deposits, and for settling conflicting or adverse claims to any such locations. Also section 2336, which provides that, "where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Also section 2344, which provides that "nothing contained in this chapter shall be construed to impair in any way rights or interests in mining property acquired under existing laws."

As we understand the views of counsel, it is contended on behalf of plaintiff that defendants, though they may have the prior location, yet, not having adversed plaintiff's application for a patent, they have forfeited all their rights within the surface lines of plaintiff's location; while in behalf of defendants it is claimed that their discovery and location, being prior to that of plaintiff, and prior to the passage of the act of May 10, 1872, all their rights and interests are saved by section 16 of said act. Section 2344, supra. This latter view seems to be supported by the opinion of the supreme court of California in the case of Mining Co. v. Spring, 59 Cal. 304. But this court, in Branagan v. Dulaney, 8 Colo. 408, 8 Pac. Rep. 669, as well as on the former appeal in this case, (Lee v. Stahl, 9 Colo. 208, 11 Pac. Rep. 77,) has announced a doctrine somewhat different from either of the foregoing views. The former opinion in this case should now be regarded as "the law of this case," at least in this court, so far as it is applicable to the matters assigned for error on this appeal. We would not feel warranted in departing from it in determining the rights of the parties to this action. When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on the retrial of the same case, upon the same state of facts, is higher authority than the rule of *stare decisis:* it is generally regarded as *res judicata*, so far as the particular action is concerned. Davidson v. Dallas, 15 Cal. 75; Tunnel Co. v. Stranahan, 21 Cal. 548. See opinion of Mr. Justice BELFORD in Mining Co. v. Bank, 2 Colo. 266. According to such former opinion, as well as the opinion in the case of Branagan v. Dulaney, supra, defendants, having secured a patent for the Argentine location, if they can prove that the vein thereof actually intersects or crosses the Lone Tree vein, are entitled to follow the vein of the Argentine, and extract the ore therefrom within the side lines of their own location, and within the patented limits of the Lone Tree loca-

tion, except within the space of actual intersection of the two veins, including a right of way through the Lone Tree vein, notwithstanding they did not adverse the plaintiff's application for a patent to the Lone Tree lode[25]; but they cannot maintain the right to the mineral within the space of lode intersection, nor other rights which they may have had by virtue of a prior location, because they did not assert and secure the same by adversary proceedings, as provided by the act of congress; a failure so to assert such rights being deemed a waiver of them. Hence, if defendants have a true cross-vein, plaintiff cannot maintain ejectment therefor, or otherwise restrain them from working the same, so long as they confine themselves thereto, and keep within the side lines of their own location, and do not attempt to take the ore from the space of lode intersection with the Lone Tree; for to this extent defendants' cross-vein is excepted out of the grant, and is not lost by a failure to adverse plaintiff's application for a patent. But it is not the doctrine of this court that section 2344 *ex proprio vigore*, operates to reserve out of the grant other rights acquired prior to the passage of the act of 1872, but that it secures the protection of such rights at the time of the issuance of the patent to those who avail themselves of the adverse procedure prescribed by the act itself. It is also claimed in behalf of defendants, that they are entitled to the same rights, without adversing, in case the veins unite, as in case of their actual crossing; and that section 2336, supra, should be so construed. The argument is that the words "below the point of union," in said section, apply to veins uniting on the "strike," or on a horizontal extension, as well as to veins which unite on the "dip," or in their downward course; and that the word "below" should be construed as equivalent to "beyond." But this is not the ordinary signification of the word. Both words are of common use. Their meaning is plain, simple, and well understood. It was well known at the date of the passage of the act that veins unite on their horizontal extension as well as in their downward course. Hence we would not be justified in assuming that congress committed the palpable mistake of using the word "below," instead of the word "beyond," if they really intended to give the preference to the prior locator in case of veins uniting on the "strike," as well as on the "dip," after the point of union is reached, without regard to adverse proceedings. The reason for the distinction is obvious. In controversies respecting the union of veins on their horizontal extension there will be conflict in their surface limits, but veins may unite in their downward course without any surface conflict. Hence, the union of veins of the former class being usually on or near the surface, the conflict will ordinarily be appar-

[25] Branagan v. Dulaney was overruled by Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607. See ante, p. 286, for the report of that case in the Supreme Court of the United States.

ent at the time of the application for the patent; and it was evidently the design of the act of 1872 to have all conflicts, so far as practicable, settled by the issuance of the patent, through the adverse proceedings therein provided for. But in case of the union of veins in their downward course, such conflict might not be foreseen or anticipated at the time of the application for the patent. Hence the provision in the latter case, that when the point of union is reached the oldest or prior location should take the vein below such point, including all the space of intersection.

There was no evidence or attempt to show that the Argentine and Lone Tree veins unite with each other in their downward course. The burden of proving that the two veins actually cross each other devolved upon the defendants; for, having failed to adverse plaintiff's application for a patent, in no other way could they show that they had prior rights within the limits of the Lone Tree patent which were excepted out of the grant; hence there was no error in the charge of the trial court in this regard. Neither was it technically erroneous to instruct the jury that their verdict should also be for the plaintiff in case they should find on all other points for the plaintiff, even if they should find that there was a crossing of the veins; for, if they should find on all other points for the plaintiff, that would include a finding that defendants had ousted plaintiff from his own patented limits at some place other than where the Argentine vein actually crosses the same, or at the space of intersection, for purposes other than a mere right of way.

Error is assigned upon the following instruction given on the trial: "If the jury believe from the evidence that the Argentine lode runs westerly from its discovery into the Lone Tree lode, and verges into it, and does not cross it, but that the two lodes become one and the same lode, that in such case the oldest patent entry—that is, the Lone Tree—is entitled to the vein and ground as far as the apex of the vein is within its patent; and this is the case whether east of such point there are two lodes or only one lode." Upon the theory that only cross-veins and veins which unite in their downward course are excepted out of the grant in case of a failure to adverse, this instruction is not erroneous.

The trial court also charged the jury to the effect that the priority of discovery between the Argentine and the Lone Tree lodes had nothing whatever to do with their decision. This instruction was not error when we consider that defendants' rights, if they have any, must be saved on the ground that they have a cross-vein which is excepted out of plaintiff's grant, and not on the ground of a prior location. The jury were instructed, in substance, that the crossing of lodes does not mean the crossing of two patents, but the actual crossing of the two veins themselves; and, further, that if they should find from the evidence that there is such an actual crossing, then the

defendants are entitled to their own vein within the conflicting area of the two patents through the space of intersection; but that such a crossing would not entitle them to leave their own patent and follow the Lone Tree lode. They were also further instructed that, if they should find there was such a crossing, to render a special verdict to that effect, specifying the point of crossing. These instructions were in substantial conformity to the views of this court in the two opinions above cited. As the jury did not return such special verdict, specifying the point of crossing, we must assume that in their judgment the evidence did not warrant such a finding. Had the jury found that there was an actual crossing, and rendered a verdict accordingly, the judgment of the court would doubtless have been such as to protect the defendants in working their cross-vein in accordance with the law as heretofore laid down by this court. As the verdict was general for the plaintiff, we see no error in the judgment, and it is accordingly affirmed.

CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO.

(See ante, page 286, for a report of the case.)

Section 6.—The Effect of Conveyances on Extralateral Rights.

EUREKA CONSOL. MIN. CO. v. RICHMOND MIN. CO.

(See ante, p. 2, for a report of the case.)

MONTANA ORE PURCHASING CO. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO.

1902. Supreme Court of Montana. 27 Mont. 288, 70 Pac. 114.

Action by the Montana Ore Purchasing Company against the Boston & Montana Consolidated Copper & Silver Mining Company. From a judgment in favor of plaintiff, defendant appeals. Modified.

Brantly, C. J.[26]—This action was brought to recover damages for trespass upon a portion of the Johnstown (patented) lode mining claim, situate in Silver Bow county. In a second cause of action the plaintiff asks that its title be quieted to the premises in controversy, and that defendant be restrained from trespassing pendente lite, and, upon final decree, that it be perpetually enjoined from trespassing or

[26] Parts of the opinion are omitted.

asserting any right or title to plaintiff's property. Before the cause was set for trial, the plaintiff was, by leave of court, allowed to dismiss the first cause of action without prejudice. The cause then proceeded as one in equity to determine an adverse claim made by defendant under section 1310 of the Code of Civil Procedure. * * *

Findings were made in favor of the plaintiff, and judgment entered thereon, granting the relief demanded. From the judgment and an order denying a new trial, the defendant has appealed.

To elucidate the pleadings and illustrate the questions at issue, reference may be had to the subjoined diagrams; the one representing the contention of the plaintiff, and the other that of defendant:

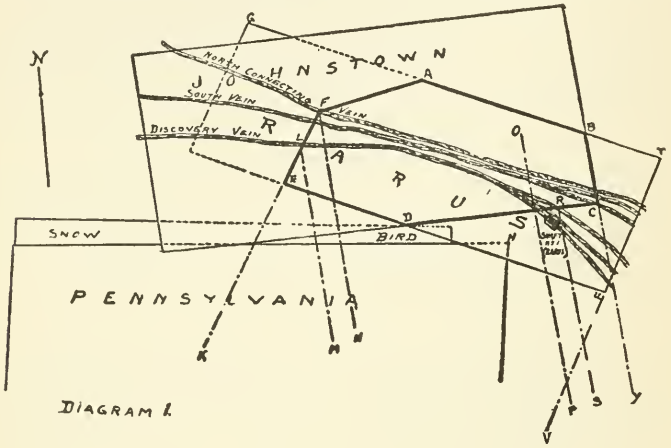


DIAGRAM 1.

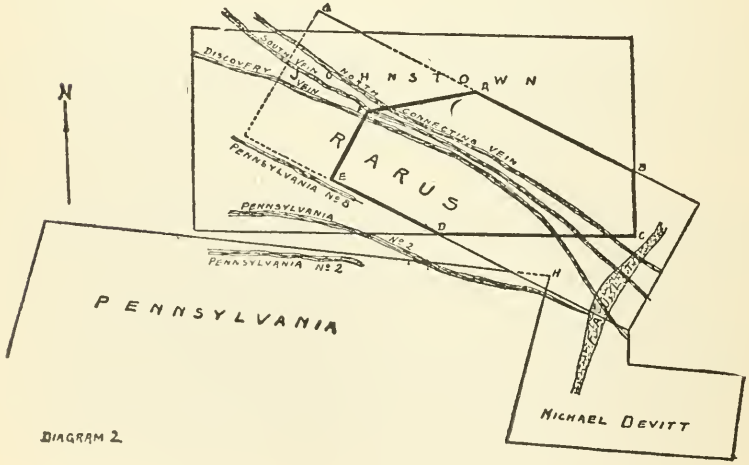


DIAGRAM 2.

The Pennsylvania claim was located on June 18, 1877, and patent issued to the locators on April 9, 1886. The Rarus was located on October 2, 1878, and a patent issued on June 5, 1884. The Johnstown was located on January 4, 1879, and patent issued on November 15, 1884. The portion of the Johnstown indicated by the letters A, B, C, D, E, F, which will hereafter be referred to as the "conveyed portion," belongs to the plaintiff. The plaintiff is also the owner of the Rarus. For some reason not explained in this record, the Rarus patent, though that claim is older than the Johnstown, excluded the part in conflict with the Johnstown. The patentees of the latter therefore acquired title to the part in conflict. The portion in conflict between the Rarus and the Pennsylvania belongs to the plaintiff. The defendant is the owner of the Pennsylvania, except the portion in conflict, and also of the Johnstown, except the conveyed portion. The Pennsylvania and Johnstown were located by the same persons, and the plaintiff and the defendant obtained title from these original locators by mesne conveyances. The triangular portion of the Snow Bird between the Johnstown and the Pennsylvania is not owned by either of the parties. The controversy involves the situation of the apex of the veins in the conveyed portion, and their continuity and identity to the ore bodies found in the workings down to the 900-foot level beneath the surface of the Snow Bird, the northern portion of the Pennsylvania, and the Johnstown south of the conveyed portion. The plaintiff claims that the veins indicated upon diagram 1 dip to the south at an angle of about 70° from the horizon, thus departing into the territory belonging to the defendant; this situation being made apparent from the identity and continuity of the veins from the apex down to the 900-foot level by numerous workings along the vein upon its dip and strike. It claims that it is entitled to these veins on their dip and along the strike between perpendicular planes descending into the earth, one parallel with the east end line of the Johnstown at a point where the veins pass through the south side line of the Johnstown, and the other through the line E, F, extended in its own direction until it meets the west end line of the Johnstown extended, and thence in the direction of that line. The defendant's contention is that two of these veins pass on their strike through the north and south side lines of the Johnstown, that plaintiff has no extralateral rights upon them in the direction of the Pennsylvania claim, and that the third or discovery vein has not been sufficiently developed to indicate what plaintiff's rights are. It also claims that the ore bodies in controversy are found in veins having their tops or apices in the Pennsylvania, and the portion of the Johnstown outside of the conveyed portion, and hence that the plaintiff has no right to them. * * * The pleadings do not show upon what the defendant bases its adverse claim, except in the averment that the ore bodies in controversy have their apices in ground belonging to the defendant, and therefore belong

to it by virtue of its ownership of the surface under which they are found. That the plaintiff was at the beginning of the action in possession of the conveyed portion of the Johnstown is admitted. It is also practically admitted that it was in the possession of the workings and ore bodies in controversy, but it is averred that such possession was wrongful. * * *

The plaintiff alleged title and possession in itself. The court found the allegation true. Indeed, title to the surface of the conveyed portion and of the Rarus and to the apex of the veins is admitted, as is also the possession of the ore bodies in controversy. An effort was made to show that the possession of the latter is wrongful, and therefore does not rest upon the legal title, by evidence that two of the veins are so situated with reference to the end lines of the Johnstown claim that extralateral rights in the direction of defendant's ground cannot be asserted, and that development of the third is not sufficient to demonstrate its continuity and identity from the apex to the point in dispute. An attempt was also made to show that, even if plaintiff has extralateral rights in the direction of defendant's premises, defendant is entitled to all of the veins below a certain point, by reason of a union of them with certain veins having their tops or apices within the Pennsylvania claim; it being older in the date of its location than the Johnstown claim. Of course, if the theory of the defendant had prevailed, the action should have been dismissed. As it did not, the result must necessarily follow that the plaintiff has the title and lawful possession of the veins on the dip and strike, and is entitled to the relief demanded, notwithstanding the prima facie presumption in favor of defendant's title to everything beneath its surface. This presumption was overturned and destroyed as soon as the identity and continuity of the plaintiff's veins from their apices to the point in controversy was established; it being made to appear, also, that plaintiff had a right to follow them on their dip. * * *

6. The court, having found that the portions of the vein in controversy belong to the plaintiff by virtue of its extralateral rights, fixed in the decree the perpendicular planes limiting these rights along the strike. Toward the east the limit was fixed at a plane passing through the point where the veins depart from the conveyed portion through the south side line, 294 feet west of the east end line of the Johnstown, and parallel with it. Toward the west the limit was fixed at a plane passing in the direction of the line E, F, until it meets the plane of the west end line of the Johnstown, and thence in the direction of that line extended. The theory upon which the latter plane was thus fixed was that the owners of the Johnstown, in fixing the end lines of the surface boundaries of the conveyed portion as they did, thus indicated their intention to convey to the plaintiff all the veins on their dip in the same direction, and that, having subsequently conveyed to the defendant the remainder of the surface

of the claim, it obtained only such portion of the veins as was not previously conveyed. The defendant contends that the deeds under which the plaintiff obtained title do not convey any extralateral rights at all, or, if they do, that such rights should be limited toward the west by planes parallel with the end lines of the Johnstown, passing through the points where the different veins pass through the end line E, F, and extended indefinitely to the south in the direction of the dotted lines L, M, and F, N.

The deeds in question are one executed by the patentees to the plaintiff's grantors on March 7, 1883, and the deed to the plaintiff from his immediate grantor on January 13, 1897. The former grants all the right, title, and interest of the grantors "to that certain portion, claim, and mining right, title, and property, on that certain ledge, vein, lode, or deposit of quartz and other rock in place, containing precious metals of gold, silver, and other metals, and situated in the Summit Valley mining district, county of Silver Bow, and territory of Montana, and described as follows, to wit." Then follows a description by metes and bounds of the conveyed portion, after which the deeds continue: "All right, title, and interest that is now possessed, together with any that may hereafter accrue, through application No. 1,265 made to the U. S. government by the grantors herein for a patent for lot No. 173, together with all the dips, spurs, and angles, and also all the metals, ores, gold, silver, and metal bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed." The latter grants to the plaintiff all the right, title, and interest and estate of the grantor in "all that portion of the Johnstown quartz lode mining claim, designated as lot number one hundred seventy-three (173) in township three (3) north, range seven (7) west, and which is particularly bounded and described as follows, to wit." Then follows a description of the conveyed portion by metes and bounds, referred to in the former deed. All reference to metals, ores, quartz-bearing rock, etc., is omitted.

In determining the effect of these conveyances, regard must be had not only to the terms employed in them and the surrounding circumstances, but also to the character of the property granted. An ordinary conveyance of agricultural land or of town lots describes the subject of the grant merely by metes and bounds, as so much of the earth's surface. Yet, without specific mention, the grant includes the right of support from lands adjacent thereto, as well as everything above and beneath the surface, unless by opposite words contained in it, some reservation is made. These rights, conveyed without specific description, are not mere incidents, but are substantive parts of that which is described, to the extent that without them the subject of the grant is not susceptible of its appropriate use and enjoyment; in other words, the rights conveyed extend far beyond

the specific words of description contained in the deed. Now, a patent from the United States to a quartz claim conveys everything which is granted by an ordinary conveyance between private parties, and in many cases much more. If the conditions of the law have been observed, it conveys, in addition to what is found beneath the surface described therein, all the veins, to their utmost depths, the tops or apices of which are found within the surface granted, though they so far depart from the perpendicular in their descent into the earth as to extend outside of the vertical side lines of such surface. As, in a conveyance of agricultural lands or town lots, everything is presumed to be granted which is necessary to the enjoyment of the species of property, without specific description, so by a deed to a quartz claim, or a definite portion thereof, as such, everything necessary to the proper and full enjoyment of that species of property will be presumed to have been conveyed, unless there be employed specific words showing the intention of the grantor to make some reservation. Extralateral rights are not a mere incident or appurtenance, but a substantial part of the property itself, which is the subject of the grant. They are not suspectible of a more definite description than that contained in the statute, which the patent follows, because the conditions beneath the surface cannot be ascertained prior to the issuance of patent; but we apprehend that they would pass from the government to the grantee under a patent to a quartz claim, as such, by virtue of the provisions of the statute, even though the patent contained no express reference to them whatever. In the first deed mentioned, it was evidently the intention of the grantors to grant no less a right than they would themselves obtain under the patent which they had applied for, because the language expressly says so. They were conveying a portion of the Johnstown claim, including a definite, fixed portion of the apex of the vein along its strike. They must therefore be conclusively presumed, in the absence of words of express reservation, to have intended to convey whatever other substantial property rights were attached to such portion of the apex. The immediate grantor of the plaintiff therefore obtained all the rights which he would have obtained by a patent directly to himself. The second deed omits any reference to the veins, or the dips, spurs, and angles thereof, but it is apparent therefrom that the parties were dealing with the property as quartz mining property,—that is, as a definite portion of the "Johnstown quartz lode mining claim"; and, from what has already been said, the presumption must obtain that the grantor intended to part with all his right, title, interest, and estate therein, of whatever character and description. Hence the inevitable conclusion that the plaintiff is vested with the rights obtained by the patentees of the Johnstown claim, and have such rights upon the veins, extralaterally, as belong to the apex embraced within the end lines of the conveyed portion. The fact that the end lines of the conveyed portion were

fixed as they were does not, standing alone, justify the conclusion that the grantors of the plaintiff intended thereby to limit or control in any way the extralateral rights as between the grantees of the different portions of the claim.

Plaintiff cites in support of the decree the case of Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co. (C. C.) 89 Fed. 529. In that case the deed of March 7, 1883, was considered by Judge De Haven, and the conclusion reached by him is in accord with the plaintiff's contention. We do not approve the conclusion reached by Judge De Haven. It is founded mainly upon the case of Stinchfield v. Gillis, 107 Cal. 86, 40 Pac. 98. In that case it is said, in part, that "if the proprietor of a tract of mining ground, which has been derived through several locations, should dispose of the same in parcels, irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds." The question in the case before us does not seem to have been definitely presented for decision by the facts, and what was said therein was apparently obiter. In Richmond Min. Co. v. Eureka Min. Co., 103 U. S. 89, 26 L. Ed. 557, also cited by Judge De Haven, the point, though adverted to, was not decided; the facts showing that the plane of the division line agreed upon between the owners of the adjacent mines was understood, at the time the agreement was made, to extend downward toward the center of the earth. This court commented somewhat upon the decision of Judge De Haven in the Lexington Case, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505, and expressed the opinion that it is not sustained by the cases cited. We concede the proposition that the parties may, by express or implied agreement, fix such boundaries for themselves as they choose, and, further, that conveyances of patented mining property by private parties are not controlled by any provision of the United States mining laws. We think, nevertheless, that in the absence of some express agreement, or one strongly implied from the circumstances, surface boundary lines should not be held controlling. There is nothing in this record to indicate that, at the time the first deed was made, either of the parties knew the direction of the dip of the veins; nor is there any presumption that they had such knowledge. If it be true that they did not, what intention could they have entertained with reference to it? If the dip had subsequently been found to be to the north, then, according to plaintiff's view, its rights would have been of little value, because they would have been cut off entirely by the line E, F, extended toward the north a short distance beyond the north line of the Johnstown. The possibilities of the situation will be realized if we suppose all the veins to pass through the line F, A. In the absence of any agreement, express or implied, we think the character of the property should control, and that only such extralateral rights are conveyed as appertain to the portion of the apex embraced within the boundaries of the conveyed portion,

bounded by planes parallel with the end lines of the claim as patented. This theory seems to us to be entirely just, and at the same time to avoid the result that would follow from the view contended for by the plaintiff; that is, that the extralateral rights conveyed are left to depend entirely upon the subsequent ascertainment of the direction of the dip.

A suggestion was made during argument that the west end line of the conveyed portion was fixed parallel with the east end line of the Rarus in a compromise arrangement in the settlement of the conflict between the Rarus and the Johnstown, and for this reason the decree is correct in fixing the west end line of the conveyed portion as the proper direction of plaintiff's extralateral rights. There is nothing in the record to support the conclusion that such a compromise was ever made, except the fact that the west end line of the conveyed portion is apparently parallel with the east end line of the Rarus. Even if it were true, however, that such a compromise was made, the result would be that both end lines limiting the extralateral rights would take their direction from the east end line of the Rarus, and not from that of the Johnstown.

In our opinion, the decree should be modified so as to fix the west end planes in the direction of the line L, M, at the points where the different veins pass through the line E, F; the plaintiff conceding that this is proper, if, upon a construction of the deeds, this court concludes that the trial court erred in fixing the west end plane in the direction of line E, F. We do not understand that the court below undertook to adjudge any rights as between the plaintiff and the owners of the ground to the east of the Pennsylvania claim. The decree has not, nor could it have, anything to do with conflicting rights beneath the Michael Devitt claim, because they are not within the issues in this case. The line fixed as to the direction of the boundary plane to the east was intended merely to give the direction of plaintiff's rights beneath the surface covered by the Pennsylvania claim, and nothing more. * * *

The order denying a new trial is affirmed. The cause is remanded, with directions that the court below modify the decree by disallowing the items of costs complained of, and by limiting the extent of the plaintiff's extralateral rights toward the west by fixing the west boundary planes in the direction of the line L, M, as indicated on diagram 1, at the points where the different veins pass through the line E, F. When so modified, the decree will be affirmed. The defendant will recover one-half of the costs of appeal. Modified and affirmed.[27]

[27] The concurring opinions of Milburn, J.,and Pigott, J., are omitted.

RILEY ET AL. v. NORTH STAR MINING CO.

1907. SUPREME COURT OF CALIFORNIA. 152 Cal. 549, 93 Pac. 194.

ACTION by George E. Riley and another against North Star Mining Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

The following is the opinion in department of MCFARLAND, J., with whom HENSHAW and LORIGAN, JJ., concurred.

"This action was brought by plaintiffs as owners of certain mining ground and premises to recover judgment against defendant for the value of gold-bearing quartz rock alleged to have been wrongfully taken by defendant from said premises. By its answer defendant denied that it had wrongfully taken any rock from said premises; admitted that it had taken rock, which it avers was of no value, from beneath the surface of plaintiffs' mining ground; but avers that the rock so taken was from a lode or vein of quartz, the apex of which was within the surface ground of the adjoining mining claim of defendant, and which in its downward course dipped laterally under plaintiffs' ground, and that defendant had the right to follow said vein under the surface of plaintiffs' ground and extract rock therefrom. The case was submitted upon a stipulated statement of facts. The court held that upon the agreed facts the defendant had the right to do the acts complained of, because the rock taken was from a lode under the surface of plaintiffs' ground which had its apex in an adjoining mining claim of defendant and dipped laterally under plaintiffs' ground. Upon this theory objections were sustained to evidence offered by plaintiffs to show the value of the rock taken by defendant. A nonsuit was granted, and judgment rendered for defendant. From this judgment the plaintiffs appeal.

"The stipulated facts material to the determination of this appeal are those hereinafter stated. On April 12, 1876, the government of the United States issued its patent to James K. Byrne for what was known and designated in the patent as the 'Massachusetts Hill Quartz Mine,' situated in Grass Valley mining district, Nevada county, Cal. The patent describes certain surface ground containing about 50 acres as designated in the official survey, which accompanied the application for the patent of said mine; also '2,138.4 linear feet of the said Massachusetts Hill quartz mine, vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining'; and also any other veins, etc., throughout their entire depth, the tops or apexes of which lie within the exterior lines of the said survey within the end lines. The Massachusetts Hill quartz mine was a consolidation of several smaller claims which had been located before Congress had passed any statute concerning mining claims or patents. One of the consolidated claims was known as the 'Ford and Reilly' and another,

the 'Stockbridge.' On September 23, 1878, James K. Byrne, as party of the first part, conveyed by deed to James P. Pollard and others a part of the said Massachusetts Hill quartz mine. The descriptive words of the property conveyed are as follows: 'All and singular that certain portion of the Massachusetts Hill mine and mining claim conveyed by the government of the United States to the said party of the first part by the patent dated April 12, 1876, and as shown by the survey and plat thereof contained and set out in said patent, which is contained and included within the following lines and boundaries, and which is described as follows, to wit: All that portion of said Massachusetts mining claim which lies east of the west bank of Wolf creek and west of the east line of said survey, being all that portion of said ground and mining claim embraced within said patent, and the survey upon which the same is founded, which lies outside of, or easterly from, that part of said Massachusetts Hill mine, known as the "Ford and Reilly location," as the same was located and claimed as "square claim," * * * it being distinctly understood that this conveyance embraces only that portion of the said Massachusetts Hill mine, as surveyed, applied for, and included in said patent, which was included in the "Ford and Reilly" survey outside of and easterly from the actual lines and boundaries of the "Ford and Reilly" square location, and shall not be so construed as to include any portion of the said Massachusetts Hill mine, so patented, which was heretofore known as the "Stockbridge location." * * * Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, also all the estate, right, title, interest, mining right, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, or in or to the said premises, and every part and parcel thereof, with the appurtenances.' The land conveyed was a small strip, less than an acre. The words 'mining right' were not part of the printed form of deed used, but were written there by the grantor Byrne. Plaintiff afterwards became the successor in interest of said Pollard and others to the property conveyed by said deed, and defendant became the successor of Byrne in all of the Massachusetts mine not conveyed by said deed; and while the ownership of the two pieces of property was thus respectively in said parties, the defendant, through underground works, followed the Massachusetts Hill mine vein under the surface of the ground described in the said deed from Byrne, and took rock therefrom under the surface of the ground, and for the rock so taken this action is brought. Defendant contends that it had the right to work the Massachusetts Hill vein where it lay beneath the surface of the land conveyed by Byrne to Pollard and others; and plaintiff contends that the deed from Byrne

conveyed all of the rock beneath the surface of the conveyed land. In our opinion, the contention of plaintiffs must be sustained.

"A good deal of respondent's brief is devoted to the discussion and elucidation of the principle in mining law and property that the owner of a quartz lode which has its apex in the surface grant has the right to follow and take rock from such lode wherever it goes in its downward course, though it dips and extends beyond his side lines. This principle must, of course, be accepted as beyond controversy. There is also considerable argument in confutation of appellants' position that the Massachusetts Hill mine is a consolidation of a number of 'square' locations, without extralateral rights. We will assume for the purposes of this decision that this contention of appellants is not maintainable, and that, under the United States patent to Byrne, all ordinary extralateral rights attached to the Massachusetts mine, and that the Massachusetts Hill lode had its apex in the surface not conveyed by the deed, and dipped easterly to the east side line of the Massachusetts surface ground. But, in the first place, it can hardly be said that the question of extralateral rights arises in this case, because there is no question here as to any rights existing outside of the Massachusetts Hill side lines, all rights involved being within those lines. Respondent seems to assume that the deed to Byrne of a part of the mine created new extralateral rights between the land conveyed and that not conveyed; but, assuming this to be so, the question is not what is the mining law as to extralateral rights, but what part of the Massachusetts mine was conveyed by the deed? There is nothing about the ownership of that part of a quartz lode which lies at a considerable distance below the surface and departs from the perpendicular more sacred than the ownership of that part of it which lies near or at the surface. Neither is inalienable. Under the patent Byrne owned all the surface of the Massachusetts mine as surveyed, and all the Massachusetts Hill lode which was within the surface between the apex and the east line of the surface ground, and he could have conveyed any part of that property. He could have conveyed the deeper part of the lode without conveying any surface ground; he could have conveyed part of the surface ground reserving all of the lode which was under it; and if he had simply conveyed surface ground without either mentioning or reserving rights under it, then there might have been a debatable question as to what a mere conveyance of surface ground conveyed. The conveyance, however, which he did make, was different from any above supposed, and the rights of the parties to this action depend entirely upon the meaning and effect of that conveyance.

"What, then, did the deed from Byrne to Pollard and others convey? It is to be noticed that there is no reservation on the face of the deed itself of any part of or rights in the property described as conveyed. There passed therefore to the grantees all property in-

cluded in the descriptive language of the conveyance. That language is hereinbefore given in full, and we need only here refer to the most material parts of it. It conveys 'all and singular that portion of the Massachusetts Hill mine and milling claim conveyed by the government of the United States to said party of the first part by the patent dated April 12, 1870,' and 'all that portion of said Massachusetts mining claim which lies east of the west bank of Wolf creek and west of the east line of said survey, being all that portion of said ground and mining claim embraced within said patent'; and it also contains this passage, 'it being distinctly understood that this conveyance embraces only that portion of the said Massachusetts Hill mine, as surveyed, applied for, and included in said patent, which was included in the "Ford and Reilly" survey outside of,' etc., together with all mining right, property, possession, claim, and demand whatsoever 'of the said party of the first part, of in or to the said premises, and every part and parcel thereof.' Now, what was the 'Massachusetts Hill mine and mining claim' conveyed by the government of the United States to the said party of the first part by the patent dated April 12, 1876? It included, as described in the patent, 'the Massachusetts Hill quartz mine' with certain described surface ground, and 2,138.4 linear feet of the said Massachusetts 'mine, vein, lode, ledge, or deposit.' Therefore, when Byrne conveyed to Pollard and others 'all that part of the Massachusetts Hill mining claim which lies east of the west line of Wolf creek, west of the east line of said survey,' etc., together with all 'the mining right, property, claim, and demand of the party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances;' he clearly conveyed to the grantees all the property and right of every kind which he had in that part of the mine lying between the west bank of Wolf creek and the east line of the surface ground. A part of that portion of the mine lying east of the west bank of Wolf creek was that part of the Massachusetts Hill quartz lode which was within that boundary, and it was conveyed as completely as a deed of the whole Massachusetts Hill lode mine would have conveyed all the said mine. There was no language of reservation; and the words employed included every kind of property and right which the grantor had in that part of the mine mentioned. We do not attach quite as much importance to the words 'mining right' as is given it by appellants, for the previous language of the deed would have been clearly sufficient to include all the grantor's mining right in the land conveyed without the subsequent express use of those words. However, those words are in entire accord with the previous language, and, although not necessary, may be considered as having some significance as 'further assurances' of the thing granted. After a conveyance of all that part of the Massachusetts mine lying east of the line mentioned, together with all of the grantor's 'mining right' therein, there was surely

nothing left to the grantor of that part of said mine. Of course, the previous language in a deed might be such as to limit the subsequent use of the words 'mining right'; but there was no language used in the deed here in question suggesting such limitation.

"Respondent contends that the deed should be construed in the light of certain facts and a certain preliminary contract between Byrne and the said Pollard. Those facts and that contract were as follows: After Byrne had made his application for a United States patent for the Massachusetts Hill mine said Pollard asserted the ownership of a mining claim called the 'Norwich,' which conflicted with a part of the Massachusetts claim as surveyed. Thereafter, to avoid the necessity of an adverse suit, a written agreement was entered into between Byrne and Pollard, by which Pollard agreed not to file an adverse claim, and Byrne agreed that after he had received a patent for the Massachusetts Hill mine he would convey a certain part thereof to Pollard. Respondent contends that by this contract Byrne was to convey only a part of the surface of the Massachusetts Hill mine, and was not to convey any part of the Massachusetts Hill lode lying under such surface, and that, therefore, the subsequent deed, whatever its language, is to be construed as not conveying any part of the Massachusetts Hill mine except such surface. But, in the first place, the said contract is by no means certain as to the precise property Byrne was to convey. It clearly contains no reservation of any underground rights. By the contract Byrne agreed to convey to Pollard 'that portion of said ground embraced within lateral lines drawn easterly from the northeast corner of the "Ford and Reilly location" and the northeast corner of the "Stockbridge location," respectively; it being distinctly understood that this agreement embraces only that portion of the said Massachusetts Hill mine as surveyed and applied for, which was included in the "Ford and Reilly" survey, outside of and easterly from the actual lines and boundaries of the "Ford and Reilly square location."' It thus refers to a part of the Massachusetts Hill mine as well as to the surface ground. Moreover, it may have been understood at that time that as the Ford and Reilly was a 'square' claim a conveyance of surface ground included all beneath it. At all events there was no absolute inconsistency between the contract and the deed which was afterwards executed. Moreover, if there had been any such inconsistency, the deed would prevail. In construing a written instrument, it is permissible to consider preceding facts and surrounding circumstances only when the instrument is itself ambiguous and uncertain. Where, as in the case at bar, the language used in the instrument in question is clear and certain, such language must govern. When property is clearly granted by a deed, the title of the grantee cannot be disturbed by extrinsic evidence tending to show that the grantor did not intend to convey such property. Of course, in a proper case and by a proper

proceeding, a deed may be reformed or declared void on account of mistake or fraud; but there is no such issue in the case at bar.

"Counsel on each side have cited a number of authorities, but we do not deem it necessary to notice them at length, for they are not determinative of the question here involved, and deal with facts different from those of the case at bar. However, the views hereinabove expressed were substantially declared in the case of Central Eureka Co. v. E. Central Eureka Co., 146 Cal. 156, 79 Pac. 834, 9 L. R. A. (N. S.) 940. The question there was whether a conveyance of ground by metes and bounds carried a part of the Summit quartz mining lode, which dipped under it, and the court held that it did not. But the court said: 'unquestionably it would have been conveyed by any instrument purporting to grant the Summit quartz mining claim, or the Summit quartz mining ground, for it was part and parcel thereof.' Our conclusion is that the court below erred in sustaining objections to evidence offered by appellants to show the value of the rock taken from the mining ground by respondent, and in granting a nonsuit and rendering judgment for respondent. Upon the agreed statement of facts, if the rock taken by respondent from appellants' land was of any pecuniary value as gold-bearing quartz, then appellants were entitled to judgment for such value.

"The judgment appealed from is reversed, and the cause remanded, for further proceedings in accordance with this opinion."

PER CURIAM.—After a reconsideration of this case in bank we are satisfied with the conclusion reached and the opinion delivered in department; and for the reasons given in said opinion the judgment appealed from is reversed, and the cause remanded, for further proceedings as directed in said opinion.[28]

BEATTY, C. J.—I dissent. The construction given to the conveyance under which the appellants claim can be upheld only by disregarding the radical difference between the relation of a mining claim to its surface description, and that which is included in the surface description of other lands. As to lands generally, a conveyance includes everything above and below the surface of the earth within vertical planes conforming to the surface lines, but this is not true of mining claims. The patent from the United States does not

[28] "In settlement of disputed title between the Nine Hour and St. Louis Lodes, The Montana Co. conveyed to the St. Louis Co. a strip of the disputed ground 30 feet wide by 400 feet in length. The deed conveyed the strip with the dips, spurs and angles, and 'all the mineral therein contained.' Afterwards a vein not then known to exist was found to dip underneath this strip. The federal courts below allowed the grantor to work this vein underneath the strip, but the Supreme Court finally held that the words above quoted were a common law grant and covered the ore in this dipping vein between the vertical lines of the strip. And they further intimated that the grantor might have a right of way to get at its vein beyond the strip. Montana M. Co. v. St. Louis M. Co., 204 U. S. 204; overruling 102 F. 430 and 104 F. 664."—Morrison's Mining Rights, 14 ed. 312–313.

transfer to the patentee everything within the vertical planes extended downwardly through his end and side lines, and it does transfer things outside of such planes; viz., all parts of veins having their apices within his surface lines, though in their descent they are carried by their dip beyond the planes of his side lines. This is the effect of a patent for the entire claim; and when the patentee conveys a part of that claim described by surface lines, the necessary implication is that he reserves all that is embraced within the lines of that portion of the surface claim not conveyed, including the extralateral dip of all veins having their apices within the lines of the part so reserved. To give a deed for a part of a mining claim any other construction is to defeat the intention of the parties 99 times in 100, and the circumstances under which the deed in question here was given afford ample proof that in this case a construction is given to the deed which neither grantor nor grantee intended.

CHAPTER VIII.

ADVERSE CLAIMS AND PROTESTS AGAINST THE ISSUANCE OF PATENTS.[1]

FEDERAL STATUTES.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

SEC. 2326. Where an adverse claim is filed during the period of publica-

[1] The steps necessary to be taken to patent mining claims cannot be exhibited as advantageously in a case book as in a text book without taking an undue amount of space for the purpose, and accordingly the student is recommended to look at the forms and procedure as set forth in the latest edition of Morrison's Mining Rights, and to consult chapters XVIII–XIX of Costigan on Mining Law. It seems desirable, however, to insert a few cases to show the nature and need of adverse claims and of protests.

tion, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever. Rev. St. U. S. §§ 2325, 2326.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.—Act March 3, 1881, 21 Stat. L. 505.

GENERAL LAND OFFICE REGULATION.

53. At any time prior to the issuance of patent protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest cannot, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a co-owner excluded from an application for patent does not have an 'adverse' claim within the meaning of sections 2325 and 2326 of the Revised Statutes. (See Turner v. Sawyer, 150 U. S., 578–586.)—Land Office Mining Regulations, rule 53.

HEALEY ET AL. v. RUPP.

1906. SUPREME COURT OF COLORADO. 37 Colo. 25, 86 Pac. 1015.

ACTION by Albert J. Rupp against John Healey and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

GABBERT, C. J.[2]—The subject-matter of controversy is the conflict between two lode mining claims, known as the "Canestota" and "Last Batch." The owners of the Last Batch applied for patent, which was adversed by the owners of the Canestota. Thereafter, suit was brought by appellee, as plaintiff, in support of this adverse against the appellants, as defendants. From a judgment for plaintiff the defendants appeal. There have been several trials, and the case has been here once before for review. 28 Colo. 102, 63 Pac. 319. Prior to the last trial, the record of which is presented by this appeal, plaintiff, over the objection of defendants, was permitted to file a supplemental complaint, basing his right to the premises in controversy upon a discovery as of a date many years subsequent to the time of filing his adverse in the local land office. Prior to the filing of this supplemental complaint the plaintiff filed an amended and additional location certificate, in which he claimed the premises in dispute by virtue of the discovery mentioned in his supplemental complaint. * * *

The proceedings in this case had their inception in the Land Office when the defendants filed an application for patent on the Last Batch lode. The next step was the filing of an adverse by the plaintiff as the owner of the Canestota, and the suit in support thereof is but a continuation of these proceedings to determine, as we have said, for the information of the land department, which, if either, of the parties is entitled to a patent from the government for the premises in controversy. Wolverton v. Nichols, supra. [119 U. S. 485.]

The notices required to be given of an application for patent are, in effect, a summons to all adverse claimants. Wolfley v. Lebanon Co., 4 Colo. 112. The latter must assert their rights by filing an adverse within the 60 days' publication of notice of application for patent. Section 2325, Rev. St. [U. S. Comp. St. 1901, p. 1429]. Unless filed within that period, it will be conclusively presumed that none exist. Lily M. Co. v. Kellogg (Utah) 74 Pac. 518. So far,

[2] Part of the opinion is omitted.

then, as an adverse claimant is concerned, it must necessarily follow that his rights to the premises in controversy must be limited to those existing at the time of filing his adverse. If he had no claim then, he will not be heard to assert a right to the premises in dispute by virtue of one brought into existence thereafter; otherwise, he would be permitted to assert title to the disputed premises by virtue of rights other than those upon which his adverse is based. The proof introduced on behalf of plaintiff failed to show the existence of the location which was the basis of his adverse against the application for patent on the Last Batch in this: That he offered no testimony to prove the validity of that location; on the contrary, the proof was of another location; or, if, strictly speaking, not of another, one which he did not prove had any valid existence at the time the adverse was filed. The location which he did prove, if good, had no validity whatever only from the time of the discovery claimed in his supplemental complaint, and had no existence until that time—a date long subsequent to that when his adverse was filed. A location without a discovery carries with it no rights. If no adverse is filed there can be no adverse suit. If the alleged rights upon which an adverse is based are not established, then the suit in support thereof must fail.

Counsel for plaintiff contend that as the jury found there was no discovery on the Last Batch, the defendants are not in a position to complain of the verdict and judgment which awarded the disputed premises to the claimant of the Canestota. If this were not a suit in support of an adverse, this contention would probably be correct. If the judgment is permitted to stand, then the plaintiff, by complying with the provisions of section 2326, Rev. St. [U. S. Comp. St. 1901, p. 1430], would be entitled to a patent for the premises awarded by the judgment, which it does not appear from the record before us he was entitled to by virtue of any adverse filed, but upon a location of such premises brought into existence long after the expiration of the period within which he was entitled to adverse the application for patent on the Last Batch.

The judgment of the district court is reversed, and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Reversed and remanded.

SEYMOUR v. FISHER et al.

FISHER et al. v. SEYMOUR.

1891. Supreme Court of Colorado. 16 Colo. 188, 27 Pac. 240.

Action in chancery by Jennie A. Fisher and Nicholas Finn, trustee, against G. M. Seymour, to declare a trust in favor of plaintiffs

in a certain mining claim patented by defendant. Decree granting the relief sought in part, and denying it in part. Both parties appeal. Reversed.

HELM, C. J.[3]—The complaint on which this cause was tried is framed upon the theory of a constructive trust. Relief is sought on the ground that Seymour, who was defendant below, holds the legal title, conveyed to him by patent, to a large part of the "Tiger" lode, in trust for the benefit of plaintiffs. The leading question to be considered is, did the failure of plaintiffs to institute adverse proceedings in the land-office on behalf of the "American Flag" location, and to contest by suit defendant's claim to a patent of the "Tiger" lode, operate to waive or forfeit their prior rights in the conflicting ground, if such rights they had?

1. The first contention of plaintiffs' counsel is that, regardless of the statutes providing for adverse contests and suits, and notwithstanding the failure of his clients to proceed thereunder, the single conceded fact of a valid and subsisting location of the "American Flag" during the "Tiger" patent proceedings is decisive of the present controversy. He asserts that the territory embraced in the "American Flag" location was so segregated from the public domain as to be absolutely protected from patent by any other party, though plaintiffs made no effort to invoke the benefit of the statutes mentioned. No proposition connected with the disposal of mineral land is more conclusively established than that such land, when held under a valid mining location, is no longer subject to exploration and entry. The locator thereof is entitled to the present exclusive possession and use as against all the world, including even the United States, which prior to patent retains the legal ownership. Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. Rep. 1110. A stranger going thereon for the purpose of discovering veins, of cutting and removing timber, or of otherwise interfering with the locator's possession and use, is a trespasser. The interest acquired by compliance with the mining statutes is, until a failure to perform annual labor, or until abandonment in some other way, for most purposes, as valuable and effective as if the title had actually passed by patent. Such interest, in this state, is subject to taxation, and is liable to levy and sale under execution in satisfaction of the owners' debts. It has been designated by the supreme court of the United States a "grant" of the present exclusive right to possession. Gwillim v. Donnellan, supra. The foregoing legal propositions lend support to counsel's contention. His able argument predicated thereon would possess great force were it not for the statutes relating to adverse proceedings. The different laws providing for the locating and patenting of mines are to be considered together, and the enactments giving the miner certain exclusive rights to mineral claims which he has located in compliance there-

[3] The statement of facts and parts of the opinion are omitted.

with must be construed in connection with the adverse provisions alluded to. It is a matter of such grave importance as to become the settled policy of the general government that all controversies relating to conflicting mining claims be, so far as possible, adjudicated prior to patent. The statutes providing for adverse proceedings in the land-office and adverse suits in the courts conclusively recognize this importance and express this policy. They do not deprive the locator of his interest, nor do they necessarily lessen its completeness and value. They simply point out a particular method by which he is to assert his priority and maintain his advantage. The government, being the paramount owner of the soil, gives the prior claimant fair and adequate notice that he must assert his interest in a certain prescribed manner. If he does not avail himself of the proceedings thus provided for him, the superior advantages obtained by virtue of his priority of discovery and compliance with the location statutes may be lost. Failing to invoke the statutory remedy given, and permitting his adversary to secure a patent covering his location or a part thereof, he will be treated in law as having voluntarily waived his prior and superior rights. Lee v. Stahl, 9 Colo. 208, 11 Pac. Rep. 77. The existence of a valid and subsisting location of the "American Flag" at the time of the patenting of the "Tiger" lode, even if the priority of such location be conceded, did not *ipso facto* protect plaintiffs. The principal purpose of adverse proceedings is to determine just such controversies as arise upon conflicting claims of this kind. Plaintiffs' prior valid location, if such they had, did not exonerate them from the duty of invoking the remedy given by the adverse statutes.

2. The foregoing views proceed upon the theory that all requirements of patent statutes relating to notices have been fairly complied with; and where, therefore, if the complaining party has failed to avail himself of the statutory adverse provisions, the fault is chargeable to himself, or at least cannot be imputed to the patentee. But if, by reason of the fraudulent conduct of the patentee, the would-be contestor is kept in ignorance of the pendency of patent proceedings, and is thus prevented from availing himself of the statutory remedy, a court of equity may, in our judgment, interfere. * * * The questions tried are: Did the complaining party have a valid and subsisting location prior, and therefore superior, to that with which it conflicted, and upon which the patent is based? and did the fraud of the patentee keep him in ignorance of the patent proceedings? If these questions be affirmatively answered, plaintiff may recover the ground in conflict. His suit in equity presupposes the proper passage of the title from its owner to the patentee, including the legality of the conveyance. He does not assert his right to the patent from the government; he accepts the instrument already given as in all respects sufficient to convey the legal title, but says: "Owing to my superior interest in the premises, which entitles

me to the exclusive possession and use, even as against the United States, and owing to the fraud perpetrated upon me by the patentee, I occupy the *status* of a beneficial owner. My equitable rights are under the law superior to the naked legal rights of the patentee. If the government, the original owner of the paramount title, is dissatisfied with the proceedings whereby this title was divested, let the proper steps be taken to secure the annulment of the instrument; but, so long as the government does not complain, I demand in equity a determination favorable to me of the private controversy between the patentee and myself." Equity must recognize his right and enforce his demand, or else, admitting its justice, must decline to notice the fraud and refuse relief.

The complaint in the case at bar substantially avers that plaintiffs were fraudulently kept in ignorance of the pendency of the patent proceedings until after the period for interposing objection in the land-office had expired. The specific grounds upon which the alleged fraud is rested may be stated as follows: *First,* that in the amended location certificate the surface boundaries of the "Little Tiger" were changed without the knowledge of plaintiffs, so as to include a much larger proportion of the "American Flag;" *second,* that in the patent notices posted and published no mention was made of the adjoining claimants; *third,* that defendant Seymour was then a co-owner with plaintiffs in the "General Shields," an adjoining property, and was acting during the absence of plaintiffs as their confidential adviser in connection therewith, and professing to protect their interests therein through feelings of kindness and friendship; and, *fourth,* that in the amended location certificate, and in the patent notices, the name of the original claim was changed from the "Little Tiger" to the "Tiger," the prefix "Little" being omitted. Upon these averments we make the following observations: *First.* The law permits a change of boundaries when amended location certificates are filed; and, if the superior rights of others are thus interfered with, such interference should be pointed out and relied upon in opposition to the trespasser's claim to a patent, if not before. This injury is as effectually waived by a failure to adverse as are prior conflicting rights where no change of surface boundaries has taken place. *Second.* The provision requiring patent notices to mention the names of adjoining claimants appears only in the land-office rules. It does not specifically exist in the statutes; but, viewing the omission as an important defect, we need only advert to the fact that the abstract before us fails to disclose any proof received or offered, tending to show that the notices in question were imperfect in this particular. *Third.* The fact that defendant was a co-owner with plaintiffs in other property, and was acting as their confidential adviser in connection therewith, furnishes no legal ground cognizable either in a court of law or equity for the complaint that he did not protect their interests in the "American Flag." Besides, it

clearly appears from the evidence that plaintiffs were not both absent, and that defendant was not acting during any of the period mentioned as the confidential adviser of both. Plaintiff Finn was in Leadville most, if not all, of the time, and he is not shown to have had any business relationship whatever with defendant. *Fourth.* The omission of the prefix "Little" in the name of the lode patented, we do not think, in and of itself, is sufficient excuse for the alleged ignorance of plaintiffs. It appears that the "Little Tiger" was known and always spoken of as the "Tiger." The habit of omitting the adjective prefix to the names of lodes seems to have been general in that mining district. The "American Flag," for instance, was known as the "Flag," and the "General Shields" is continually referred to by witnesses testifying at the trial on both sides as the "Shields." It does not appear that the description of the property was in any other way defective. The mining district, the locality, the reference to natural objects or permanent monuments, we are bound to assume were unobjectionable. One of the corners is described as "Corner No. 1–831," of the "General Shields." Neither the sufficiency of the posting of the plats and notices on the claim and in the land-office nor the adequacy of the newspaper advertisements is successfully challenged. We cannot say, nor did the jury or court find, that plaintiffs, including Finn, who was present in Leadville, were deceived by the change of name, and thus prevented from instituting a proper contest by adverse proceedings.

3. But the questions submitted to the jury, together with the findings of the trial court, show that the decree against Seymour and in favor of plaintiffs is predicated largely upon a fiduciary relationship. The theory in this regard is that Mrs. Fisher employed Seymour to act as her agent and confidential adviser as to the value and sale of the "American Flag;" that having accepted such agency, and while conferring and corresponding with her in relation thereto, he took advantage of her absence, and through her trust and confidence, coupled with his fraudulent conduct, kept her in ignorance of his intention and acts until a patent issued to himself covering a large part of the trust-estate. The existence of this fiduciary relationship is most strenuously denied by Seymour, and the evidence upon the subject is not as satisfactory as could be desired; but we do not propose to determine its sufficiency to support the findings and judgment, embarrassed as the investigation would be by the fact that our facilities for correctly weighing the credibility of witnesses are greatly inferior to those possessed by the trial court, for the most careful scrutiny of the complaint upon which the cause was tried wholly fails to reveal any averment setting up, or tending to set up, the alleged agency. It would be an unwarranted assumption for us to hold that the allegation concerning defendant's co-ownership and agency in the "Shields" pleads, or was intended to plead, a similar fiduciary con-

nection with the "American Flag." The admission of the evidence bearing upon Seymour's agency as to the "American Flag," over his repeated objections, was, therefore, error. * * *

Reversed.

TURNER ET AL. V. SAWYER.

1893. SUPREME COURT OF THE UNITED STATES. 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. 192.

APPEAL from the circuit court of the United States for the district of Colorado. Affirmed.

Statement by Mr. Justice BROWN:

This was a bill in equity filed by the appellee, Sawyer, against Robert Turner, George E. McClelland, and J. S. Allison, the purpose of which was to have the defendant Turner declared a trustee for the use of the plaintiff of an undivided five-eighths interest in what was known as the "Wallace Lode," which had been previously patented by the government to Turner, and to compel a conveyance of the same to the plaintiff.

The case was submitted upon an agreed statement of facts, which was substantially as follows: The Wallace lode, so called, was discovered and located by John Clark on September 20, 1878. On August 12, 1882, Clark conveyed an undivided three-fourths of this lode to Amos Sawyer and Marcus Finch. On May 1, 1882, Clark conveyed the other one-fourth interest to William Hunter, but the deed was never recorded, the parties supposing it to be lost; and on October 25th he made another deed to Hunter, which contained a recital that it was made to supply the place of the other. On October 26, 1882, Amos Sawyer and Marcus Finch reconveyed the undivided one-half of the lode to John Clark. On January 8, 1883, Marcus Finch conveyed an undivided one-eighth to Alice E. Finch. On March 16, 1883, Clark and Hunter conveyed three-fourths of the Wallace lode to Amos Sawyer and John S. Sanderson.

At this time, then, the lode was owned as follows: Amos Sawyer, one-half, or four-eighths; John S. Sanderson, three-eighths; Alice E. Finch, one-eighth.

It so remained from March 16, 1883, to January 12, 1885, when Amos Sawyer assumed to convey his undivided one-half interest to Alfred A. K. Sawyer, who also became possessed of the one-eighth interest of Alice E. Finch, November 3, 1886.

The controversy arose over a lien filed August 14, 1883, by one John F. Teal for annual labor done upon the lode at the request of John S. Sanderson and Amos Sawyer. Teal claimed a lien for the sum of $148.10, and filed notice thereof in the recorder's office of

Clear Creek county. One Charles Christianson also filed a similar notice, claiming a lien for $227.95. On January 12, 1884, Teal instituted a suit in the county court of Clear Creek county to enforce his lien, and made John S. Sanderson, Marcus Finch, P. F. Smith, and —— Sawyer defendants, as the owners thereof. There was no service upon Sawyer, and he was not in court. On June 2, 1884, Teal proceeded to sell the interest of John S. Sanderson, Marcus Finch, and P. F. Smith to pay the amount of his decree, at which sale A. K. White became the purchaser, took his certificate of purchase from the sheriff, and sold and assigned it to Turner, who obtained a sheriff's deed on March 3, 1885. This deed purported to convey the whole Wallace lode. Christianson instituted a suit against the same defendants as in the Teal suit, which was pending at the time, to enforce his lien against the same.

On April 24, 1885, Turner, who had done the annual labor on the claim for the year 1884, before he obtained a sheriff's deed, published a forfeiture notice against the appellee, Sawyer, under Rev. St. § 2324, but no forfeiture notice was published against Alice E. Finch, who still owned an undivided one-eighth of the lode, nor against Amos Sawyer, who owned one-half of the lode during the year 1884, and until January 12, 1885, as above stated. Appellant Turner declined an offer made January 18, 1885, to pay five-eighths of the $100 for the annual labor of 1884 on behalf of Alice E. Finch and Amos Sawyer, on the ground that the records showed only Sanderson and Sawyer as having any remaining interest. On October 27, 1885, Turner filed in the office of the clerk and recorder of Clear Creek county an affidavit that Alfred A. K. Sawyer, the appellee, had wholly failed to comply with the demands contained in the forfeiture notice. Subsequently, and about November 1st, Turner instituted proceedings in the United States land office at Central City, Colo., for the purpose of procuring a patent for the lode in his own name, and on April 13, 1886, a receiver's receipt was issued to him by the receiver of the land office, acknowledging payment in full for the entire lode; and on April 20th he conveyed an undivided one-fourth interest to George E. McClelland, by deed recorded December 6, 1886, and another undivided one-quarter to J. S. Allison, by deed recorded May 19, 1886.

On March 17, 1887, the appellee, Sawyer, filed this bill, charging the patent to have been procured by the appellant Turner by false and fraudulent representations as to ownership, and praying that the title to an undivided five-eighths of the lode be deemed to belong to the appellee, and that Turner convey the same to him.

Upon the hearing in the court below it was found that at the time Turner applied for the patent and received the receipt therefor, he was not the legal owner of an undivided five-eighths of such lode,

and it was decreed that he convey the same to the appellee, Sawyer, and the other defendants were enjoined from interfering.

From this decree an appeal was taken to this court by Turner and McClelland.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The real question in this case is whether the title to the half interest which Amos Sawyer assumed to convey to the appellee, Alfred A. K. Sawyer, January 12, 1885, was obtained by Turner through the proceedings taken by Teal in the enforcement of his lien for labor done upon this lode, or by the forfeiture notice published for the annual labor done in 1884.

1. It is evident that nothing can be claimed by virtue of the suit begun by Teal, January 12, 1884, against John S. Sanderson, Marcus Finch, P. F. Smith, and —— Sawyer, as the owners of such lode, to enforce his lien, since there was no service upon Sawyer, no appearance entered for him, and he was never in court. Judgment was rendered in this suit against Sanderson, Smith, and Finch, the last two of whom appear to have had no interest in the property. Whether such proceedings were effective as against Sanderson, it is unnecessary to inquire. Not only was Sawyer not served in the suit, but in the execution sale no pretense was made of the sale of any interests except those of Sanderson, Smith, and Finch, which were struck off to A. K. White, and were subsequently sold by him to Turner, to whom the sheriff's deed was given March 3, 1885.

2. It remains, then, to consider whether Turner acquired such interest by the publication of his forfeiture notice against Sawyer for the annual labor of 1884. This notice was as follows:

"To A. A. K. Sawyer, residence unknown: You are hereby notified that I have performed the annual labor required by law for the year 1884 upon the Wallace lode, situated in Cascade mining district, Clear Creek county, Colorado, and that unless within the time prescribed by law you pay your proportionate amount of said expenditure your interest in said lode will be forfeited to me under the provisions of section 2324 of the Revised Statutes of the United States. Robert Turner."

This notice was published pursuant to Rev. St. § 2324, which enacts that "upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his in-

terest in the claim shall become the property of his co-owners, who have made the required expenditures."

It will be observed that the right to give this notice of a claim for contribution is limited to a co-owner who has performed the labor. Turner was not a co-owner with Sawyer at any time during 1884, as Alfred A. K. Sawyer did not receive his deed from Amos Sawyer until January 12, 1885, and Turner did not receive his deed from the sheriff until March 3, 1885. He did, however, hold an inchoate title by virtue of White's purchase at the execution sale of June 2, 1884, and the subsequent assignment, August 25, 1884, of the sheriff's certificate to him. He appears also to have obtained the assignment of certain other judgments which had been recovered by William Hunter against Sanderson and Smith. These judgments were assigned to him August 27, 1884, sales made under them January 12, 1885, and certificates of sale issued to Turner, who thus became the purchaser under these judgments. Neither of these, however, made him a co-owner during the year 1884, within the meaning of the statute, which, providing as it does for the forfeiture of the rights of a co-owner, should be strictly construed. Indeed, by the laws of Colorado title to land sold under execution remains in the judgment debtor until the deed is executed. Hayes v. Mining Co., 2 Colo. 273, 277; Laffey v. Chapman, 9 Colo. 304, 12 Pac. 152; Manning v. Strehlow, 11 Colo. 451, 457, 18 Pac. 625.

This accords with cases from other states, which hold that the estate of the defendant in execution is not divested by a seizure and sale of his lands, but only by a payment of the purchase money and delivery of a deed. The sheriff's certificate is necessary as written evidence to satisfy the statute of frauds and to identify the holder as the person ultimately entitled to the deed, but it does not pass the title to the land, nor constitute the purchaser the owner thereof. Catlin v. Jackson, 8 Johns. 420; Gorham v. Wing, 10 Mich. 486, 493; Green v. Burke, 23 Wend. 490, 498; Hawley v. Cramer, 4 Cow. 717, 725.

It seems, however, that Turner, soon after the making and filing by him of an affidavit of nonpayment by Sawyer of his alleged proportion of his claim for labor, instituted proceedings in the land office at Central City for the purpose of procuring a patent for this lode, to be issued to himself alone, and prosecuted such proceedings so far as to obtain, on April 13, 1886, a "receiver's receipt," so called, issued from the land office and delivered to him. This receipt was recorded in the recorder's office of Clear Creek county, Colo., and on April 20th Turner conveyed to appellants Allison and McClelland each an undivided one-quarter interest in the lode. Whether he procured such receiver's receipt by fraudulent and false representations, as charged in the bill, it is unnecessary to determine. It is clear, to put upon it the construction most favorable to him, that he acted under a misapprehension of his legal rights. There is nothing in

the record showing that he ever became possessed of Sawyer's interest in the lode. Assuming that, under the proceedings in the Teal suit, he had acquired the legal title to Sanderson's interest, he became merely a tenant in common with Sawyer, and his subsequent acquisition of the legal title from the land office inured to the benefit of his cotenants as well as himself. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his cotenants, to acquire a title to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. We think the general rule, as stated in Bissell v. Foss, 114 U. S. 252, 259, 5 Sup. Ct. 851, should apply; that "such a purchase [of an outstanding title or incumbrance upon the joint estate for the benefit of one tenant in common] inures to the benefit of all, because there is an obligation between them, arising from their joint claim and community of interest; that one of them shall not affect the claim to the prejudice of the others." Rothwell v. Dewees, 2 Black, 613; Van Horne v. Fonda, 5 Johns. Ch. 388; Lloyd v. Lynch, 28 Pa. St. 419; Downer v. Smith, 38 Vt. 464.

A title thus acquired the patentee holds in trust for the true owner, and this court has repeatedly held that a bill in equity will lie to enforce such trust. Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 530; Marqueze v. Frisbie, 101 U. S. 473; Rector v. Gibbon, 111 U. S. 276, 291, 4 Sup. Ct. 605; Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217.

It is contended, however, that Sawyer is precluded from maintaining this bill by the fact that he filed no adverse claim to the lode in question under section 2325 Rev. St. This section declares that, "if no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication" of notice of application for patent, "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." By section 2326, "where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim," etc. In this case there was no conflict between different locators of the same

land, and no contest with regard to boundaries or extent of claim, such as seems to be contemplated in these provisions. Turner did not claim a prior location of the same lode, and made no objection to the boundaries or extent of Sawyer's claim, but asserted that he had acquired Sawyer's title by legal proceedings. The property of such claim was not a question which seems to have been contemplated in requiring the "adversing" of hostile claims. In this particular the case of Garland v. Wynn, 20 How. 6, is in point. In this case it was held that where the register and receiver of public lands had been imposed upon by ex parte affidavits, and a patent had been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded, that the jurisdiction of the courts of justice was not ousted by the regulations of the commissioner of the general land office. "The general rule is," says Mr. Justice Catron, "that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claim." Such was the case of Comegys v. Vasse, 1 Pet. 212, and the case before us belongs to the same class of ex parte proceedings; nor do the regulations of the commissioner of the general land office, whereby a party may be held to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court. See, also, Cattle Co. v. Becker, 147 U. S. 47, 57, 13 Sup. Ct. 217, and cases cited.

The judgment of the court below was right, and it is therefore affirmed.[4]

CREEDE & CRIPPLE CREEK MINING & MILLING COMPANY, *Petitioner*, v. UINTA TUNNEL MINING & TRANSPORTATION COMPANY.

(See ante, p. 295, for a report of the case.)

POORE ET AL. v. KAUFMAN.

1911. SUPREME COURT OF MONTANA. 119 Pac. 785.

ACTION by J. A. Poore and others against Louis Kaufman. From a judgment for plaintiffs, defendant appeals. Affirmed.

HOLLOWAY, J.—On March 1, 1899, the defendant, Kaufman, made application to the local land office for a patent to his Little Spring

[4] See Land Office rule 53 quoted at the beginning of this chapter.

quartz lode mining claim. During the period of publication, an adverse claim, by Thornton and others, was presented and allowed, and suit commenced within 30 days (in May, 1899). Proceedings in the court were carried on for several years. On January 7, 1910, this court rendered its final decision (Thornton v. Kaufman, 40 Mont. 282, 106 Pac. 361, 135 Am. St. Rep. 618); on February 4th the remittitur issued, but was not filed in the district court until December 3, 1910. On January 24, 1911, this action was commenced. In the complaint the plaintiffs set forth the foregoing history, and allege that defendant, Kaufman, failed to do any annual representation work during 1903, 1904, or 1909; that, on January 8, 1910, they relocated the ground as the Fair Trial quartz lode mining claim; and that they have ever since been in the peaceful possession of the same. They allege that the patent proceedings are still pending in the local land office; that Kaufman has not presented to the local land office a copy of the judgment in Thornton v. Kaufman, or paid to the land office the purchase price of the ground, or received a receiver's receipt, but that he is about to proceed to secure a patent to the ground in controversy. The prayer is that the plaintiffs' title be quieted as against Kaufman, and for an injunction, restraining him from prosecuting the patent proceedings. A temporary injunction was issued. Thereafter, on February 16, 1911, defendant appeared and presented a demurrer to the complaint and a motion to dissolve the temporary injunction. On February 25th the demurrer and motion were overruled, and this appeal is prosecuted from the order of the court, refusing to dissolve the injunction.

But a single question is presented for our determination, viz.: Has the district court of Silver Bow county jurisdiction to hear and determine the questions raised by the complaint? Appellant insists that these questions are exclusively for the determination of the Land Department, and this assertion is predicated upon the failure of these plaintiffs to adverse Kaufman's application for patent. However, a reference to the facts stated above discloses that plaintiffs' right to or interest in the property was not initiated until more than 10 years after the period of publication of Kaufman's notice of application for patent expired. During the period of publication, therefore, these plaintiffs did not have any right upon which to base an adverse claim. They could not anticipate that such right would thereafter arise, and even if they could such contemplated right would not give them standing as adverse claimants. In Enterprise Mining Co. v. Rico-Aspen Min. Co., 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96, the court said: "The obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible and certain right, and not a mere possibility." If, then, it is only a present, certain and tangible right which justifies an adverse claim, under section 2325, United States Revised

Statutes (U. S. Comp. St. 1901, p. 1429), clearly these plaintiffs could not bring themselves within the provisions of the law applicable to adverse claimants.

[1] That neither the pendency of the proceedings for patent before the land office, nor the adverse suit by Thornton and others, relieved Kaufman from the necessity of doing the annual representation work upon his Little Spring claim is settled beyond controversy. The duty to perform such work continued until payment of the purchase price is made to the government (2 Lindley on Mines [2d Ed.] § 632; 1 Snyder on Mines, § 493; South End Min. Co. v. Tinney, 22 Nev. 19, 35 Pac. 89; section 2324, U. S. Rev. Stat. [U. S. Comp. St. 1901, p. 1426]); and failure to perform such work subjects the claim to relocation. Black v. Elkhorn Min. Co., 163 U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221.

It is alleged in the complaint, and for the purposes of this appeal will be treated as true, that Kaufman did not do any representation work at all during 1909. Under such circumstances, the ground was open to relocation, and plaintiffs, having relocated it by complying with the law, acquired the right to the peaceable possession of the ground, and to patent, if they follow up their claim by complying with the law hereafter.

[2] Appellant bases his claim that this action will not lie upon the following provisions of section 2325, supra: "If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists." Clearly this section refers to a present, tangible claim, existing at some time during the 60-day period of publication. In the case of P. Wolenberg, 29 Land Dec. Dept. Int. 302, Secretary Hitchcock said: "The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local land office during the period of publication relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time, and which could not, therefore, have been made known at the local office during the period of publication." As to such existing claim, an adverse must be filed in the land office, or the claim is waived. Hamilton v. Southern Nevada Gold, etc., Min. Co. (C. C.) 33 Fed. 562; Lily Mining Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518; 27 Cyc. 607.

[3] But what shall be said with reference to the adverse claim which arises after the period of publication has expired? It is then too late to present to the land office an adverse claim. Counsel for appellant suggest that the only remedy available to such adverse

claimant is by protest to the Land Department against the issuance of patent to the original application, under the last clause of section 2325, supra, which reads: "And thereafter no objection from third parties to issuance of a patent shall be held sufficient, except it be shown that the applicant has failed to comply with the terms of this chapter." A very able dissertation upon the meaning of that clause is found in Wight v. Dubois (C. C.) 21 Fed. 693, wherein Judge Brewer said: "I think all that it covers is the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with. He does not appear as a party asserting his own rights; but, if we may, so to speak, parallel these proceedings with those in a court, such an objector appears as an amicus curiæ —a friend of the court—to suggest that there has been error, and that the proceedings be stayed until further examination can be had. Such a protest does not bring the protestant into court for the assertion of his own title or rights; does not revivify rights lost by a failure to adverse. True, if the protest or objection is sustained, the proceedings will be set aside, new ones must be commenced, and then the objector may be in a position to assert his rights; but, if the protest or objection be not sustained, the objector, like an amicus curiæ, has nothing more to say in the matter. In other words, the right to protest is not the right to contest. The latter is lost by the failure to adverse. The former remains open to everyone—holders of adverse claims, as well as others. But the protest is only to the officers of the government, challenges only the applicant's claims, and in no manner brings up for consideration any claims of the protestant. Such a protest can be made only before the Land Department, and, if there rejected, the protestant has no further standing to be heard anywhere. The protest cannot be made the basis of any litigation in the courts, for the courts are only open to those who have rights to assert; they sit for the determination of controversies. They do not, at the instance of strangers, review the regularity of proceedings between parties who are competent to determine such regularity, and who do not themselves invite any judicial determination." That this construction of the statute is correct is manifest from a review of the several paragraphs of chapter 6 (sections 2318-2352, Rev. Stat. U. S. [U. S. Comp. St. 1901, pp. 1423-1442]).

[4] If the Land Department had jurisdiction over conflicting claims between private individuals, and the machinery for determining such claims, there would never have been any occasion for referring adverse claims to the courts for adjudication. It is only because the Land Department cannot determine such claims that the aid of the courts is invoked. The Land Department has held uni-

formly that questions arising over the failure of an entryman to do the annual representation work, or the relocation of his claim by another for his failure to do such work, involve matters of conflicting rights between rival claimants with which the Land Department does not concern itself; but such questions are for the determination of the courts. In the case of P. Wolenberg, supra, the Secretary of the Interior further said: "The annual expenditure of $100, in labor or improvements, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts, and not to the Land Department. In this respect, the requirement made by section 2324 is essentially different from that made by section 2325, which makes the expenditure of $500, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the Land Department." To the same effect are The Marburg Lode Mining Claim, 30 Land Dec. Dept. Int. 202; Cleveland v. Eureka G. M. & M. Co., 31 Land Dec. Dept. Int. 69.

In Barklage v. Russell, 29 Land Dec. Dept. Int. 401, there was an attempt made to follow out the suggestion of appellant, in this instance, by protesting to the government against the issuance of patent. The protestant there alleged that the patent applicant had failed to do the annual representation work, and that he (protestant) had relocated the ground; but the protest was summarily dismissed, and Secretary Hitchcock said: "The allegations of the protest amount to nothing more nor less than the assertion of a claim adverse to that of the entryman, Russell, and arising subsequent to the period of publication of the notice of the application for patent. The Land Department has nothing to do with questions as to the performance of annual expenditure upon mining claims, nor of alleged relocations thereof by reason of failure to perform such expenditure, arising under section 2324 of the Revised Statutes. These questions are solely matters between rival or adverse claimants to mineral lands and go only to the right of possession of the land involved. The determination of that right, between such claimants, however, or whenever the adverse claim may be alleged to have had its origin, is committed by the mining laws to the courts alone."

[5] It appears, therefore, that a protest to the Land Department, based upon the allegations of plaintiffs' complaint herein, would not receive any consideration whatever. If the Land Department will not hear the plaintiffs, and the courts have no jurisdiction to hear them as appellant contends, they are remediless. But this cannot be. If their allegations are true, they have a valid, subsisting mining claim. Such a claim is property in the highest sense of the term, subject to be sold, mortgaged, and inherited, without in-

fringing the paramount title of the government. Cobban v. Meagher, 42 Mont. 399, 113 Pac. 290; Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532. According to the allegations of this complaint, plaintiffs' property will be injured by Kaufman's proceeding to secure patent to the same ground; and the courts of this state are open to afford a remedy for such injury, or to prevent it in a proper case. Article 3, § 6, Montana Constitution.

Our conclusion is that, if an adverse claim is in existence at any time during the 60-day period of publication, it must be presented to the land office, or it is waived. If such adverse claim does not arise until after the period of publication has expired, the claimant may invoke the aid of the court, in the first instance, to quiet his title as against the patent applicant. This is the holding in Gillis v. Downey, 85 Fed. 483, 29 C. C. A. 286, approved in 2 Lindley on Mines, §§ 696 and 731, and is, we think, clearly correct.

Some reliance is placed by appellant upon the decision of this court in Murray v. Polglase, 23 Mont. 401, 59 Pac. 439. So far as the decision in that case is concerned, it does not go further than to hold that these plaintiffs would not have been heard to intervene in the adverse suit of Thornton v. Kaufman, for the reason that they had not presented an adverse claim to the local land office. In the course of the opinion, this court, after determining that the interveners in that action had no standing in court, by way of suggestion, said: "If they have any right to the ground in controversy, they * * * must be relegated to the land office, where they may be permitted to show that the parties who may succeed herein have not complied with the law"—and in support of this is cited Lindley on Mines (1st Ed.) § 758, where the same suggestion is to be found. The decision in Murray v. Polglase was rendered in 1899. In the second edition of Lindley on Mines, issued in 1903, the author adds to the suggestion above the following: "Or the relocator may pursue his remedy in the courts, regardless of the pendency of patent proceeding"—citing Gillis v. Downey, supra. But, as shown by the decided cases, the Land Department has now finally adopted the policy that it will not consider a protest, based upon such grounds as plaintiffs here present, so that the suggestion made in Murray v. Polglase is now of no force.

The order of the district court is affirmed.

Affirmed.

CHAPTER IX.

MINING LOCATIONS AS RELATED TO OTHER RIGHTS IN PUBLIC LANDS.

Section 1.—Indian Reservations and Forest Reserves.

KENDALL ET AL. v. SAN JUAN SILVER MIN. CO.

1892. SUPREME COURT OF THE UNITED STATES.
144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. 779.

IN error to the supreme court of the state of Colorado.

Action by James W. Kendall, Annie G. Shackelford, Ruah E. Dickinson, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque against the San Juan Silver Mining Company, to determine the right of possession to a mining claim. Judgment for defendant, which was affirmed by the state supreme court. Plaintiffs bring error. Affirmed.

Mr. Justice FIELD delivered the opinion of the court.

The defendant, a corporation organized and existing under the laws of Colorado, in October, 1880, applied to the proper land office in that state for a mineral patent for a lode claim known as the "Titusville Lode," in San Juan county, which was 1,500 feet in length by 300 feet in width. Within the time prescribed by statute, and during the month, the appellants here, Kendall and others, filed in the same land office an adverse claim for a portion of the premises of which the defendant desired to obtain a patent, asserting a prior and superior right to the same, as part of a lode known as "Bear Lode," which they had discovered on the 3d of September, 1872, and upon which they had sunk a discovery shaft, and performed the several acts required to perfect a mineral location under the laws of the United States and the local rules and customs of miners. Within 30 days thereafter they brought the present action under section 2326 of the Revised Statutes, to determine, as between the parties, the right of possession to the disputed premises, the issue of a patent for the same being dependent upon such determination. In their complaint they allege the performance of the labor required, and all other acts necessary to preserve the lode from forfeiture. That lode, as originally located, extended 1,500 feet in length and 100 feet on each side of the center of the vein. In October, 1878, the locators filed an additional certificate of location in the local land

office, claiming 150 feet on each side of the center. And they aver that the Titusville lode, claimed by the defendant corporation, is a junior location, and includes in length 1,200 feet of the surface ground of the Bear lode, and in width covers more than the south half of the surface ground for the 1,200 feet.

The defendant, in its answer, denies that the ground in controversy comprised part of the unappropriated public domain of the United States, and that it was open to location on the 3d day of September, 1872, as set forth by the plaintiffs, and alleges that at that date the ground embraced a portion of a certain tract of land which, by treaty between the United States and certain confederated bands of the Ute Indians in Colorado, concluded March 2, 1868, and proclaimed on the 6th of November of the same year, had been reserved for the use and occupancy of the Indians, and that the Indian title to the tract was not extinguished until March, 1874. 15 St. p. 619. The answer also alleges that the Titusville lode claim was located on the 29th day of August, 1874; that all acts were done necessary to constitute a valid location of the premises; and that the legal title to the lode, and the right to its possession, had, by various conveyances from the original locators, become vested in the defendant; and it prays judgment therefor.

By the terms of the treaty mentioned, a tract of country, which included the mining property in question, was set apart for the absolute and undisturbed use and occupation of the Indians therein named, and for such other friendly tribes or individual Indians as, from time to time, they might be willing, with the consent of the United States, to admit among them; and the United States agreed that no persons except those designated, and such officers, agents, and employes of the government as might be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to "pass over, settle upon, or reside in the territory described," except as therein otherwise provided. 15 St. pp. 619, 620. The effect of the treaty was to exclude all intrusion for mining or other private pursuits upon the territory thus reserved for the Indians. It prohibited any entry of the kind upon the premises, and no interest could be claimed or enforced in disregard of this provision. Not until the withdrawal of the land from this reservation of the treaty by a new convention with the Indians, and one which would throw the lands open, could a mining location thereon be initiated by the plaintiffs. The location of the Bear lode, having been made while the treaty was in force, was inoperative to confer any rights upon the plaintiffs. Whatever rights to mining land they subsequently possessed upon the original Indian tract were founded upon a new location, made more than two years after the withdrawal of the reservation, and after the Titusville lode had been located by the defendant. Had the plaintiffs, immediately after the withdrawal of the reservation, relocated their Bear lode, their position would

have been that of original locators. They would then have been within the rule in Noonan v. Mining Co., 121 U. S. 393, 7 Sup. Ct. Rep. 911. That rule was this: That, where a party was in possession of a mining claim on the withdrawal of a reservation caused by a treaty with the Indians, with the requisite discovery, with surface boundaries sufficiently marked, with a notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, and causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day. But such was not the case here. The reservation by the treaty was withdrawn in March, 1874; the Titusville lode was located on the 29th day of August, 1874; and the Bear lode of the plaintiffs was not relocated until two years afterwards.

Whatever rights, therefore, the plaintiffs had, subsequently to the withdrawal of the reservation, in the premises claimed by the defendant, arose from its disclaimer. By that disclaimer the company relinquished to the plaintiffs such portion of their Bear lode, with surface width of 50 feet, as came in conflict with the premises claimed by it under the Titusville location; and, upon its motion in the trial court, judgment was entered, pursuant to such disclaimer, for the plaintiffs for the amount disclaimed and for the defendant for the residue.

The plaintiffs now seek, by their writ of error, to recover the residue of the Titusville lode, insisting that under the decision in Noonan v. Mining Co. they have a right to all the premises which were covered by their illegal location during the pendency of the Indian treaty. But such is not the proper construction of that decision. There was in that case no new location by different parties, after the removal of the reservation, to interfere with the old location, then renewed, and with a proper record.

There is another view of this case, which leads to the same conclusion. Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the state or territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States. The act of Colorado of February 13, 1874, requires the discoverer of a lode, within three months from the date of discovery, to record his claim in the office of the recorder of the county in which the lode is situated by a location certificate.

It also provides that a location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of the location, the number of linear feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

The reservation of the premises in controversy by force of the

Indian treaty was extinguished April 29, 1874. On that date the premises in controversy were open to location, and within three months afterwards the duty rested upon the plaintiffs to record the certificate of the location of their lode, if they desired to preserve any right in it. No such record of their location was made within that time. No record was made or desired by them until an additional certificate of location was filed by them, claiming 150 feet on each side of the center of their vein, which was not done until October, 1878. As they failed to comply with the law in making a record of the location certificate of their lode, it does not lie with them to insist that their wrongful entry upon the premises during the existence of the Indian reservation operated in their favor against parties who went upon the premises after they had become a part of the public domain, and made a proper location certificate and record thereof, and complied in other particulars with the requirements of the law.

Judgment affirmed.[1]

UNITED STATES v. RIZZINELLI ET AL.

1910. District Court, D. Idaho, N. D. 182 Fed. 676.

Basil Rizzinelli and another were convicted of maintaining saloons on mining claims within the limits of the Cœur d'Alene National Forest Reserve without a permit. On demurrer to indictment. Overruled.

Dietrich, District Judge.[2]—The defendants are charged with the maintenance of saloons upon mining claims within the limits of the Cœur d'Alene National Forest without a permit, and in violation of the rules and regulations of the Secretary of Agriculture. The claims were duly located, subsequent to the creation of the forest reserve, and they are possessory only, no application for patent ever having been made. The technical sufficiency of the indictment is not called into question, but it is urged: First, that the provision of the statute upon which the rules referred to are founded is unconstitutional, and the rules, therefore, void, because the statute itself does not sufficiently define the acts to be punished, and because it attempts to delegate to an executive officer legislative power; and, second, that, even if the statute be held to be valid, it cannot properly be construed as conferring authority upon the Secretary of Agriculture to make rules applicable to the lands embraced in valid mining

[1] See Le Clair v. Hawley, 18 Wyo. 23, 102 Pac. 853. On Indian reservations, military reservations, national parks, forest reserves and reservoir and irrigation works sites, see Costigan, Mining Law, 89–94.

[2] Parts of the opinion are omitted.

claims, whether the same were located before or after the creation of the forest reserve. * * *

Concretely stated, the second question is whether or not, assuming that the maintenance of a saloon upon public lands within a national forest to which no previous claim of any kind has attached constitutes a criminal offense, a like offense is committed when such a saloon is maintained upon forest reserve lands, embraced within a valid mining claim, located after the creation of the reserve. * * *

The only express reference in the act to the location of mining claims is found in the last sentence of the second paragraph above quoted, which in full is:

"Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof: Provided, that such persons comply with the rules and regulations covering such forest reservations."

And the last sentence of the last paragraph above quoted, namely:

"And any mineral lands in any forest reservation which have been, or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained."

It is the contention of defendants that the valid location of a mining claim ipso facto withdraws the land embraced therein from the jurisdiction of the Secretary of Agriculture, and that therefore the rules under consideration are wholly inapplicable. Upon the other hand, the government points to the fact that while qualified persons are authorized to locate claims upon lands containing valuable mineral deposits, within as well as without the boundaries of a reservation, there is no language in the act justifying the conclusion that by the location of a mining claim the lands embraced therein are withdrawn from the reservation, and much significance is attached to the clause which provides that the right to go upon reservations for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources," is expressly conditioned upon a compliance with the rules and regulations covering forest reservations.

For a definition of the rights of the locator upon public lands, both parties refer to section 2322 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1425), where it is declared that:

"The claimant shall have the exclusive right of possession, and enjoyment of all the surface (of the claim), and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically," etc.

It is conceded by the government that by the forest reserve act of June 4, 1897, Congress did not intend to, and did not, limit or qualify the rights of a locator, or confer any authority upon the Secretary of Agriculture, by regulation or otherwise, to limit or qualify such rights, or to intrude upon the exclusive possession or infringe upon the exclusive "enjoyment" guaranteed to the locator under section 2322; in short, that the rights of a locator of a mining claim within the boundaries of a forest reserve are substantially the same as those of one who locates such a claim upon the public domain. It is also conceded that the right of exclusive possession runs against the government, as well as against third persons. Obviously, therefore, the controversy is primarily confined to a consideration of the purpose to which the locator may ordinarily and under general law properly devote the surface possession of his mining claim; the defendants contending that they may use the same "for any purpose, whether the same be consistent with mining or not," and, upon the other hand, the government asserting that a locator is, under section 2322, authorized to use the surface of his mining claim only for purposes connected with or incident to the exploration and recovery of the mineral therein contained.

It is familiar law that the citizen may acquire any one of three possible estates in mineral lands upon the public domain. He may content himself with locating a claim in compliance with the statutes and rules and regulations, in which case he acquires a possessory title only, both the equitable and legal title remaining in the United States; or, in the second place, after making such location, he may comply with the further requirements of the law, and pay the required purchase price, thus acquiring the equitable title, the legal title still remaining in the United States; or he may proceed one step further, and obtain patent, thus divesting the government of all interest, both legal and equitable.

The defendants here have the possessory title only. They have a distinct but qualified property right, and, even if we assume that their interest is vested, it is one which may be abandoned at any moment, or forfeited. The primary title, the paramount ownership, is in the government, and upon abandonment by the locator, or his failure to comply with the conditions upon which his continuing right of possession depends, the entire estate reverts to the government; all the time, it retains the title, with a valuable residuary and reversionary interest. This interest, whatever it may be, it has the right to protect and obviously the interest which it retains is the entire estate, less that which is granted by the terms of section 2322, providing that locators shall have "the exclusive right of possession and enjoyment of all the surface of their locations." The true meaning of this granting clause it is therefore of fundamental importance to determine, for by its terms, properly interpreted, the estate of the defendants in the lands which they occupy is to be measured, and,

in the absence of any express declaration in the act of June 4, 1897, upon the nature and extent of this estate largely depends the question whether or not there is such incompatibility between the character of a mining claim, and the status of lands in a forest reserve, that the valid location of the former operates to withdraw the lands embraced therein from the latter. The inquiry is substantially limited to the meaning of the phrase "exclusive enjoyment," for, notwithstanding the existence of the Cœur d'Alene forest reserve, it is conceded that the defendants are entitled to the exclusive possession of their claim not only as against third persons, but as against the United States. The government is not seeking to qualify or limit the possession of the defendants or in any respect to intrude thereon, but only to restrict the uses to which such possession shall be devoted. The defendants have a right to the exclusive enjoyment of the surface of their claims, and our task is to determine what is meant by the word "enjoyment" as the name is used in the statute. It is not self-explanatory, or unequivocal, and must be interpreted in the light of the general purpose of the law in which it is found, and in harmony with other provisions thereof. Consciously or unconsciously we necessarily read something into the statute which is not therein expressed. We may differ as to what should be interpolated, but that there must be some interpolation may not be doubted. The government inserts, after the word "enjoyment," the phrase "for mining purposes," and the defendants the phrase "for all purposes." No other language is suggested, and, indeed, no middle ground appears to be possible; the "enjoyment" is either for mining purposes alone, or for all purposes without qualification or restriction. Under a familiar rule of statutory construction, the necessity of reading into the statute one or the other of these two phrases to make it complete, and its adaptability to either of them, of itself operates strongly to determine the question in favor of the government, for it is well settled that in public grants nothing passes except that which is clearly and specifically granted, and all doubts are to be resolved in favor of the government. Oregon R. & N. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; Coosaw M. Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537. But, independent of this rule, considerations pertinent to the construction of private grants and contracts clearly lead to the conclusion that the right of enjoyment which Congress intended to grant extends only to mining uses. The general purpose of the mineral laws is well understood; it was to encourage citizens to assume the hazards of searching for and extracting the valuable minerals deposited in our public lands. In form the grant is a mere gratuity; but, in considering the propriety of such legislation, it may well have been thought that by reason of the stimulus thus given to the production of mineral wealth, and rendering the same available for commerce and the arts, the public would indirectly receive a consideration commensu-

rate with the value of the grant. In that view doubtless the legislation has for a generation been generally approved as embodying a wise public policy. But under what theory should the public gratuitously bestow upon the individual the right to devote mineral lands any more than any other public lands to valuable uses having no relation to mining, and for what reason should we read into the statute such a surprising and unexpressed legislative intent?

With much earnestness the consideration is urged that it has become more or less customary to erect valuable buildings upon lands embraced in mineral claims to be used for purposes having no necessary relation to mining operations, and that great hardship would ensue and important property rights would be confiscated if the locator's "enjoyment" of the surface be limited to uses incident to mining. But even if it be true, as suggested, that in many localities sites for dwelling houses and business structures could not be conveniently obtained except upon lands containing valuable mineral deposits and embraced in located claims, the fact is without significance and lends no support to the defendants' contention. If we assume that Congress was cognizant of or anticipated such conditions, we may further reasonably assume that it was thought that ample protection against embarrassment to the mining industry from such a source was furnished in other provisions of the law. At the same time the government confers upon the locator the right to possess and enjoy the surface of a mining claim for mining purposes without the payment of any consideration therefor, it offers for a small consideration to convey to him the entire estate. The government gives the mineral to him who finds it, and, for purposes incident to the extraction thereof, permits him to possess and use the ground in which it is found. It does not give him the ground, but empowers him to purchase it, and that he may do if he desires its permanent and unrestricted use. The unqualified title to the land embraced in a valid possessory claim thus being made available to the locator for the moderate prices prescribed by law, there is no force to the argument implied in this contention. Nor is there any merit in the suggestion that the custom of so using the surface of unpatented claims without objection from the government is so prevalent as to imply assent or acquiescence on the part of Congress in its unrestricted use. In the absence of material waste, it would not be strange if, as a general rule, officers of the government should ignore the occupancy of such lands for purposes beyond those authorized by law, so long as it is without substantial injury. But such inaction serves neither to shed light upon the original legislative intent, nor to confer on the occupant the legal right to continue such occupancy over the objection of the government.

The rights of a locator of a mining claim, and the nature of his estate therein, have not infrequently been considered by the Supreme Court of the United States. That the discovery of valuable mineral

and the proper location of his claim operate to vest in the locator a substantial interest may not be doubted. The interest thus acquired is a valuable property right which may be mortgaged, transferred, inherited, and taxed; the right of possession is good against all the world including the United States. Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; St. Louis Mining Co. v. Montana Mining Co., 171 U. S. 650, 19 Sup. Ct. 61, 43 L. Ed. 320; Elder v. Wood, 208 U. S. 226, 28 Sup. Ct. 263, 52 L. Ed. 464. In some of these cases, and in others, meager expressions may be found incidentally touching upon the question here in controversy; but in none of them, so far as I am aware, was it either involved or discussed. And indeed there has come under my observation no reported case from any court in which the point may be said to have been decided, except possibly Teller v. United States, 113 Fed. 273, 51 C. C. A. 230, where, in a well-considered opinion, the Circuit Court of Appeals of the Eighth Circuit reached a conclusion which it is thought strongly supports the present contention of the government. Speaking of the rights conferred by that part of the statute which we have been considering, the court says:

"It gave him (the locator) nothing but the right of present and exclusive possession for the purpose of mining. It did not divest the legal title of the United States, or impair its right to protect the land and its product, by either civil or criminal proceedings from trespass or waste. * * * The two titles recognized by the United States confer totally different rights. The first one confers a right (and it may properly enough be said to be vested in the locator) to the possession of the land for the purpose of carrying on his mining operations as long as he performs the required conditions."

Holding, therefore, that the right of a locator of a mining claim to the "enjoyment" of the surface thereof is limited to uses incident to mining operations, no serious difficulty is encountered in reaching the further conclusion that forest reserve lands embraced in a mining claim continue to constitute a part of the reserve, notwithstanding the mineral location, subject, of course, to all the legal rights and privileges of the locator. The paramount ownership being in the government, and it also having a reversionary interest in the possessory right of the locator, clearly it has a valuable estate which it is entitled to protect against waste and unlawful use. It is scarcely necessary to say that it is the substantial property right of the government, and not the extent to which such right may be infringed in the present case, that challenges our consideration. The burden imposed upon the principal estate by the construction and maintenance of a little saloon building may be trivial, and the damage wholly unappreciable. But that is not to the point. If a worthless shrub may as a matter of legal right be destroyed in the location

of a saloon, the entire claim may be stripped of its timber, however valuable, to give place for other saloons and other structures having no connection with the operation of the mine. To concede any such right at all is necessarily to concede a right without limit; there is no middle ground. It is therefore repeated that, subject to the locator's legitimate use for mining purposes, the government continues to be the owner of the land, and is interested in conserving its value and preventing injury and waste. That being true, in the absence of express language evincing an intent on the part of Congress to withdraw such lands from the jurisdiction of the forestry service, there is no reason to infer any such intent. Upon the other hand, it is much more reasonable to assume that Congress advisedly concluded to leave the government's interest therein subject to the jurisdiction and under the protection of the department that is responsible for the care and protection of the surrounding lands and forests. The locator's rights are not curtailed; there is no intrusion upon his possession; his right of "enjoyment" is not necessarily qualified or infringed by the retention in the forest reserve. He may possess and utilize the entire claim, including the surface, for all the purposes and to the same extent for and to which he could have possessed and used it if no forest reserve existed. To hold that the defendants are indictable for maintaining a saloon upon their mining claim in the reserve is not to hold that their rights as locators are less because the lands are in the reservation than they would be if the claims were upon the open public domain. In neither case does the location of the claim confer the right to maintain a saloon thereon. The only difference is that a remedy is provided in the one case which does not exist in the other. In both cases the government has a remedy by way of civil action; upon the forest reserve, assuming the law to be valid, it has the additional remedy of a criminal prosecution, of which it is here availing itself.

In reaching this conclusion I have not thought it necessary to consider the precise meaning and application of that portion of the act of June 4, 1897, which recognizes the right of persons to enter upon the forest reservations "for all proper and lawful purposes including that of prospecting, locating, and developing the mineral resources thereof; provided, that such persons comply with the rules and regulations covering the said forest reservations." At the oral argument there was some suggestion by counsel for the government that in this language is to be found authority for the Secretary to make rules regulating mining operations carried on upon valid, located mining claims. The point, however, does not here call for any expression of opinion, for it is not presently involved. The defendants are not charged with the violation of such a rule, and so far as I am advised no such regulations have been promulgated. The charge against the defendants is not of carrying on mining operations with-

out a permit, but of transacting other business having no relation to such operations.

For the reasons stated, the demurrer will be overruled.

Section 2.—Railroad Land Grants.

TRAPHAAGEN ET AL. v. KIRK.

1904. SUPREME COURT OF MONTANA. 30 Mont. 562, 77 Pac. 58.

BILL by F. W. Traphaagen and another against Thomas Kirk. From a decree in favor of defendant, plaintiffs appeal. Affirmed.

CLAYBERG, C. C.—This is an appeal from a judgment against plaintiffs. The action was brought for the specific performance of a contract for the conveyance of land. Defendant filed a demurrer to the complaint, which was sustained by the court, and, plaintiffs having elected to stand upon their complaint, judgment followed for defendant.

The cause of action set forth in the complaint is very peculiar, and the allegations of the complaint are, briefly, as follows: That on and prior to February 23, 1900, the defendant was the owner, by conveyance from the Northern Pacific Railway Company, of section 23, township 3 south, of range 3 east, Gallatin county, and in the possession thereof; that he was also the owner of the right to use the waters of Elk creek in connection with said land; that plaintiffs, prior to February 23, 1900, discovered upon said land "a vein or lode of corundum-bearing rock," and believing said land to be unoccupied land of the United States, and said vein or lode open to location, duly located a claim "upon and along said vein" upon and across said land; that the United States, in its grant of this land to the Northern Pacific Railway Company, reserved and exempted therefrom "all minerals found in the soil of said real estate," and that the railway company made the same reservation in its conveyance to defendant; that prior to June 30, 1897, the proper mineral land commissioners of the United States reported this land as nonmineral, and classified it as such, whereupon the railway company applied to the Commissioner of the General Land Office for leave to enter it, which application was approved, and on July 12, 1897, a patent was issued to the railway company, which reserved "all minerals contained in the soil" of said land, and that afterwards the railway company conveyed to the defendant, making the same reservation; that on or about February 23, 1900, plaintiffs informed defendant that they had discovered this vein, and had located and staked a mining claim upon said land, and that the claim, if properly worked, would be of great value; that by reason of the grant to the defendant and his predecessors, and the

reservations therein contained, the plaintiffs and defendant were in doubt as to their respective legal rights in and to the aforesaid vein; that it was recognized by the respective parties that such rights could only be determined by litigation, which might be further complicated by the assertion of the rights of the government and the railway company, respectively; that for the purpose of avoiding such litigation and preventing costs, expenses, and delays, and for the purpose of amicably settling their differences, and in consideration of the discovery and location of this claim, and of the mutual promises and agreements between the parties, it was agreed that plaintiffs should transfer to the defendant an undivided one-third interest in said lead or lode, and that defendant should transfer to plaintiffs an undivided two-thirds interest in said lead or lode, together with the necessary amount of real estate covered by said location to enable the lode to be operated, and also a right to the use of the waters of Elk creek necessary to the mining and treatment of ores and the operation of said mine; that the respective transfers should be mutually made within a reasonable time from the date of said agreement; that afterwards, and prior to the commencement of the suit, and prior to the refusal of defendant to make such transfer, plaintiffs, relying upon the agreement of defendant as aforesaid, in good faith expended large sums of money in an attempt to interest capital in the operation, exploration, and development of said lode or lead; that thereafter, and prior to the commencement of the suit, plaintiffs offered to convey to said defendant an undivided one-third interest in said lode or claim, and demanded that defendant should comply with the conditions of the agreement on his part, and convey to the plaintiffs an undivided two-thirds interest therein, but that defendant has failed and refused so to do.

The complaint then sets forth the particular description of the land in question so as be conveyed, in the following language: "An undivided two-thirds (2-3) interest in and to a strip of land not exceeding 300 feet in width, running diagonally across the upper portion of section 23, in Tp. 3 south, of R. 3 east, in the county of Gallatin, state of Montana, at the place on said section where a certain lead or lode of corundum-bearing rock is contained and situate, said strip of land to conform to the meandering of said vein or lode of corundum-bearing rock, together with the necessary ingress and egress to the same for the purpose of mining, milling and marketing the ore therefrom, and otherwise prospecting and operating said lode, together with the right to such use of the water right of said defendant, consisting of the right to the use of the waters of said branch of Elk creek, in said county and state, as may be necessary for the proper operation, treatment, mining, milling, and concentration of the ores of said lode, extending in a northeasterly and southwesterly direction from the principal point of discovery and development thereon of said lode to the limits of said section."

The demurrer was based upon the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that it was ambiguous, uncertain, and unintelligible in certain respects set forth in the demurrer.

The only question necessary to consider is, does the complaint state facts sufficient to constitute a cause of action? In order to arrive at a correct conclusion as to the alleged rights of plaintiff in or to any of the land in question, we must consider and determine the character and legal effect of the patent to the land, under which defendant is alleged to have acquired ownership. To this consideration a brief review of the source of title seems important.

Defendant is alleged to claim ownership under a patent issued by the United States to the Northern Pacific Railway Company. In 1864 Congress passed an act granting to the Northern Pacific Railroad Company "every alternate section of land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of the railway line as said company may adopt through territories of the United States," extending from Lake Superior to Puget Sound. Act July 2, 1864, c. 217, 13 Stat. 365. At the next session Congress amended this grant by providing "that all mineral lands be, and the same are, hereby excluded from the operations of this act." Res. Jan. 30, 1865, No. 10, 13 Stat. 567. It is apparent from these provisions of the grant (which are all that are material to the questions herein involved) that mineral lands did not pass by the grant. The Supreme Court of the United States have always held that the grant was, in præsenti, floating in its character until the line of the railroad was definitely located, when it attached to each alternate section mentioned in the grant, and became fixed in its character. When the land was surveyed by the government the particular sections mentioned in the grant were specifically designated, and the grant then took effect from its date. Under these decisions the railway company insisted that the character of the land, as to whether mineral or not, must be determined as of date of the grant, and, if it was not then known to be mineral, it passed by the grant. This condition seems to have been recognized by the Supreme Court of the United States until it had for consideration the case of Barden v. N. P. Ry. Co., 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992, wherein it was decided that all mineral land except iron and coal, whether known or unknown, was excluded from the grant.[3] Subse-

[3] But unlocated mineral land on the right of way has been held not to be excluded from the railroad land grant. Wilkinson v. Northern Pac. R. Co., 5 Mont. 538, 6 Pac. 349.

In construing the statute to exclude both known and unknown mineral lands from the grant, Field, J., for the court, said in the Barden case:

"It seems to us as plain as language can make it that the intention of congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral.

quent to this decision Congress passed an act "to provide for the examination and classification of certain lands in the states of Montana and Idaho." Act Feb. 26, 1895, c. 136, 28 Stat. 683. Section 7 of this act provides: "No patent or other conveyance or title shall be issued or delivered to the Northern Pacific Railroad Company for any lands in such districts until such lands shall have been examined and classified as non-mineral." Under the provisions of this act, mineral land commissioners were appointed by the government to examine and classify, as to their mineral character, all lands, under the afore-

After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and, among other things, that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted, or otherwise appropriated, and were free from preemption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd sections, nearest to the line of the road, might be selected. * * *

"It is difficult to perceive the principle upon which the term 'known' is sought to be inserted in the act of congress, either to limit the extent of its grant or the extent of its mineral, though its purpose is apparent. It is to add to the convenience of the grantee, and enhance the value of its grant. But to change the meaning of the act is not in the power of the plaintiff, and to insert by construction what is expressly excluded is, in terms, prohibited. Besides the impossibility, according to recognized rules of construction, of incorporating in a statute a new term,—one inconsistent with its express declarations,—there are many reasons for holding that the omission of the word 'known,' as defining the extent of the mineral lands excluded, was purposely intended.

* * * * * * * * * *

"The earnest contention of the counsel of the plaintiff arises principally, we think, from an unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of the government is not limited to known minerals, the title, it is said, may be defeated years after the land has passed into the hands of the grantee, and improvements of great extent and value have been made upon its faith. It is conceded to be of the utmost importance to the prosperity of the country that titles to land, and to minerals in them, shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public. We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the interior department, and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of the public lands of the United States, and the adjustment of private claims to them under the legislation of congress. It can hear contestants, and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon, and determine, the character of lands to which different parties assert a right; and when the controversy before it is fully considered, and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of con-

said grant, claimed by the Northern Pacific Railroad Company in the above-mentioned states. The complaint alleges full compliance with this act, and the issue of patent by the United States to the Northern Pacific Railway Company, the successor in interest to the Northern Pacific Railroad Company, the grantee named in the original grant.

Now, what is the effect of this patent? Congress has provided for the disposition of various classes of public lands, and has authorized the officers of the Land Department to ascertain the character of such land and issue patent therefor. In the absence of fraud, imposition, or mistake, the determination of that department as to the character of land is conclusive. Barden v. N. P. Ry. Co., supra, and cases cited. No fraud, imposition, or mistake has been alleged, and, the patent having been issued, it is conclusive that the land in question is nonmineral in its character.

Plaintiffs' alleged rights were originated by the discovery and location of a mineral vein within the limits of the land alleged to have been patented to defendant's predecessor in interest. Section 2319, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1424], provides: "All valuable mineral deposits in mineral lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are contained, to occupation and purchase." Under this section, in order to make a location, surface ground, including the vein or lode, must be appropriated, and such surface ground must belong to the United States. State v. District Court, 25 Mont. 504, 65 Pac. 1020, and cases cited. Under plaintiffs' own allegations, none of the surface ground of the land in question was owned by the United States, it having been patented to the Northern Pacific Railway Company. There can be no doubt, therefore, that plaintiffs, by their attempted location of a mineral claim upon the land in question, acquired no rights at all. According to their own showing, the "mineral in the soil" was the only thing remaining in the government. This court knows of no statute of the United States which provides for the acquirement of "minerals in the soil," aside from the mineral statute above quoted, which requires the location of certain surface ground,

gress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed; and as the grant excludes mineral lands, in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance.

"It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake its determination is conclusive against collateral attack." Barden v. Northern Pac. R. Co., 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. 1030, 1034, 1038.

On railroad land grants, see Costigan, Mining Law, 71–82.

including the minerals sought to be obtained. Plaintiffs do not claim to be the successors in interest of the United States in and to the "minerals in the soil," otherwise than by the making of a mining location under the laws of the United States.

There is still another objection to the validity of plaintiffs' claimed location. The surface of the entire section No. 23 had been patented by the government to the Northern Pacific Railway Company, and conveyed to defendant. Under this conveyance the defendant was entitled to the exclusive possession of all the surface ground of such section. Any entry by any other person for any purpose, without defendant's consent, was a trespass upon the rights of the defendant. It has been uniformly held by the Supreme Court of the United States that a valid mining claim cannot be initiated by the commission of a trespass. Clipper M. Co. v. Eli. M. Co., 24 Sup. Ct. 632, 48 L. Ed. 944, and cases cited. We are therefore clearly of the opinion that the pretended location of a mining claim by the plaintiffs was absolutely of no force or effect.

But again, the contract of which specific performance is sought is without adequate consideration; the only thing of value to be surrendered by plaintiffs is an alleged interest in a certain vein. We have seen that they had no such interest, and therefore could not surrender or convey the same or any part thereof.

But it is claimed by plaintiffs that the information given by them to defendant of the existence of this vein in his land was sufficient consideration. Of what value would such information be to defendant unless plaintiffs could also furnish to him the means of acquiring the subject-matter disclosed? By their own showing, the minerals contained in such vein were reserved by the United States. We do not consider the validity of this alleged reservation by the government (which is extremely doubtful: Silver Bow M. Co. v. Clark, 5 Mont. 378, 5 Pac. 570), because, if it is void, all "minerals in the soil" passed by patent, and plaintiffs show no interest therein.

Plaintiffs also allege that the settlement of the matters in dispute between the parties without litigation was sufficient consideration. While in some instances this might be sufficient to support some contracts, we are clearly of opinion that the allegations of plaintiffs in this case do not disclose such an adequate consideration as is necessary to support a suit for specific performance. Section 4417, Civ. Code; Mayger v. Cruse, 5 Mont. 485, 6 Pac. 333; Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123.

Neither do we believe that the complaint contains a sufficiently specific description of the property involved to warrant any decree.

We advise that the judgment appealed from be affirmed.

Per Curiam. For the reasons stated in the foregoing opinion, the judgment is affirmed.

VAN NESS v. ROONEY et al.

1911. Supreme Court of California. 160 Cal. 131, 116 Pac. 392.

Action by H. J. Van Ness against John Rooney and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Lorigan, J.[4]—This action was brought by plaintiff against defendants to quiet his title to a quartz mining claim, known as the "Five Pines Mine," located in Trinity county, and for an injunction restraining defendants from trespassing on or extracting ore therefrom. Plaintiff proved a valid location of the mine by one Edwin Baker, on August 26, 1895, and a conveyance by said locator to plaintiff; that the claim consisted of a piece of land 1,500 feet long by 600 feet wide located partly in section 20 and partly in section 29, township 35 north, range 1 west, M. D. M., about half the surface ground of said claim lying in each of said sections; that the annual work and labor required by law to be done had been performed on said claim each year after its location, and that the claim embraced valuable gold-bearing ore, and contained no deposits of coal or iron.

The defendants asserted title to that portion of the mining claim located in section 29 as successors in interest, under a patent issued by the United States, to the Central Pacific Railroad Company, dated February 14, 1896. This patent purported to convey to said railroad company some 200,000 acres of land in various sections, townships, and ranges in California, including all of said section 29. The descriptive calls in the patent are followed by the granting clause, whereby the United States grants to the Central Pacific Railroad Company "all the tracts of land described in the foregoing, yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute shall not be construed to include coal and iron lands."

Judgment was entered in favor of plaintiff, declaring him to be the owner and entitled to the possession of the mining ground in question against every one, except the government of the United States; that defendants had no right or title to any part thereof, and enjoined them from trespassing upon the property. Defendants moved for a new trial, which being denied, this appeal is taken solely from the denial of said order.

The judge of the superior court of Trinity county, Hon. J. W. Bartlett, before whom this cause was tried, in ordering judgment for plaintiff filed a written opinion in which he set forth so clearly the questions involved in the suit, with accurate declarations of law bearing on them, that we quote from it extensively.

After referring to the facts, as we have recited them above, in-

[4] Parts of the opinion are omitted.

cluding the terms of the patent to the railroad company and the exceptions contained therein, the opinion of said superior judge proceeds:

"What, if any, is the effect of the exception and reservation above set forth in said patent is determinative of the issues involved in this case. Plaintiff's claim is that by virtue of this exception and reservation no title passed by the patent to that portion of the 'Five Pines mine' which lies within that portion of said section 29 of township 35 north, range 7 west, M. D. M., to which defendants allege title. Defendants claim that plaintiff is debarred from making this claim by reason of the provisions of the act of Congress of March 2, 1896 [chap. 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603)], which prohibits the bringing of actions by the United States to annul patents theretofore erroneously issued under railroad or wagon road grants, after five years from the time of the passage of said act of Congress; that this action is an unauthorized attack upon a United States patent, and that if plaintiff was ever in a position to question the validity of the passing under said patent of the title to said section 29 he has lost his rights by not bringing his action within five years from the time the patent was issued. Defendants also claimed that the excepting clause is inserted in the patent without any authority of law, and is void and of no effect.

"These questions are of momentous importance, for on their proper solution depends the validity of titles of locators on much of the mineral lands in the mining districts of Trinity county and in other of the mining counties of the state of California. * * *

[2] "Mineral lands situated within the limits of railroad grants are subject to location up to the time of the issuance of the patent, clearly determined in the great case of Barden v. N. P. R. R. Company, 154 U. S. 288 [14 Sup. Ct. 1030, 38 L. Ed. 992] by the Supreme Court of the United States, and this court is the final arbiter of all the questions arising in cases like the one before this court, and this decision alone precludes this court from finding that plaintiff's grantor, was not entitled to this land when the patent under discussion was executed to the Central Pacific Railroad Company.

[3] "The argument of defendants that plaintiff is debarred from the relief he seeks because of the provisions of the act of Congress of March 2, 1896, is wholly without merit. Plaintiff is not seeking in this action to annul or avoid a patent issued by the government of the United States. The effect of granting the relief he asks does not in any way invalidate the patent in question. It is an interpretation of the instrument that will be brought about by the judgment in this action, which will determine what, if any, lands in section 29 of township 35 north of range 7 west, M. D. M., are included in the reserving clause of the patent. It is safe to presume that when the President of the United States was about to sign the patent, if it had been called to his attention that there was on said section 29 a quartz

claim which has been duly located, which was being worked, which had defined bounds, or could be identified and defined, that he would have refused to sign the patent until these lands had been expressly excepted. But to except such lands it was not necessary for him to know that an actual location had been made. That could be an actual fact, as in this instance it was, without the knowledge reaching the land department or the President prior to the issuance of the patent. By virtue of such location, and because of the mining statutes, and by reason of the interpretation made by the Supreme Court of the United States as to the effect of such location, the lands embraced in the location had passed into the possession and control of the locator; his location had as effectually given him a right to the possession of the located claim, as if it had been granted to him by the government of the United States.

[4] "The moment the locator discovered a valuable mineral deposit on the lands and perfected his location in accordance with law, the power of the United States government to deprive him of the exclusive right to the possession and enjoyment of the located claim was gone; the lands had become known mineral lands, and they were exempted from lands that could be granted to any railroad company. On August 25, 1895, a lode had been found to exist on the section in controversy in this action, mineral lands had been found in one of the tracts mentioned in the patent, and by force of the reserving clause therein these lands never passed from the government by reason of the patent.

"The case of Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168, is most convincing that such is the construction that should be placed on the reservation in the patent. In this case the Supreme Court of the United States says: 'Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode. A copy of the patent is not in the record, so we cannot speak positively as to its contents; but it will be presumed to contain reservations of all veins or lodes known to exist pursuant to the statute. At any rate, as already stated, it could not convey property which had already passed to others. A patent of the United States cannot, any more than a deed of an individual, transfer what the grantor does not possess.'

[5] "Plaintiff's predecessor in interest having duly located the Five Pines mine, before the issuance of the patent here in question, that portion of said mine which lies within the west half of the north-

west quarter of section 29 of township 35 north of range 7 west, M. D. M., must be held to be not included in the lands conveyed by the patent to the Central Pacific Railroad Company because of the reservation contained in the granting clause of the patent, and judgment in this action should be in favor of the plaintiff, as prayed for in this complaint."

The affirmance of this appeal might be rested upon the legal principles announced in this opinion of the trial judge and further consideration of the matter made unnecessary, if it were not that some points and authorities cited by appellant here are to be noticed, as well as some decisions, other than those referred to by the trial judge, to be cited. * * *

Certain California cases are cited by appellant under which they claim that the patent to the railroad company is conclusive against the attack of respondent. These are particularly: Gale v. Best, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44; Saunders v. La Purisima, etc., Co., 125 Cal. 159, 57 Pac. 656; Paterson v. Ogden, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31; and Jameson v. James, 155 Cal. 275, 100 Pac. 700. But an examination of these cases shows that the attack on the patent was made by junior claimants. As to such claimants, it is clear, as pointed out in those authorities, that the patent to the land as agricultural land is conclusive.

But the plaintiff here is not a junior claimant. He had made a valid mining location and initiated his title to his mining claim in the quarter section in question nearly six months before the issuance of the patent to the railroad company, and, as the law is that mineral deposits whose existence are known when the patent is issued do not pass under it, the patent was ineffectual to transfer any title to the appellants as to the mining claim of the respondent.

[6, 7] As to the right of the respondent to have his title quieted as against defendants, we have no doubt. Respondent was in possession of his mining claim under a valid location made prior to the issuance of the patent under which appellants claim, and was, therefore in privity with the United States. He is the equitable owner of the mining claim, and while the government holds the legal title it holds it in trust for him, to issue a patent therefor, if he should elect to obtain one upon his complying with the provisions of the law entitling him to such issuance. Under such circumstances, while respondent's title to the mining claim is only an equitable one, and though the legal title is in the government, he is entitled to have such equitable title quieted against appellants who, though they acquired no title whatever to the mining claim of respondent under the patent to the railroad, are nevertheless asserting title to it against respondent.

The order appealed from is affirmed.[5]

[5] See Loney v. Scott, 57 Ore. 378, 112 Pac. 172, where it was held that the plaintiffs who had attempted to locate placer claims on land not subject

Section 3.—State School Land Grants.

HERMOCILLA v. HUBBELL et al.

1891. Supreme Court of California. 89 Cal. 5, 26 Pac. 611.

Belcher, C.—This action is ejectment to recover possession of the east half of the east half of the south-west quarter, and the west half of the west half of the south-east quarter, of a certain sixteenth section of land situate in Placer county. Other portions of the section are described in the complaint, but, as no contest was made as to them, they need not be referred to further. The defendants Hubbell, Shea, and California Quartz Mining Company alone answered. They denied all the averments of the complaint, and alleged that the portions of the section above described were in 1850, and ever since had been, and then were, mineral lands of the United States, having known valuable mineral deposits therein, consisting of placers containing gold in paying quantities, and quartz ledges or deposits of gold-bearing rock in place, carrying gold and other precious metals in paying quantities; and that during all the times mentioned the said placers and quartz ledges had been, from time to time, in the actual possession of citizens of the United States, who were working and exploring the same for the gold and precious metals they contained. They further alleged that in the year 1880 two quartz mining claims, which are particularly described, were located on the demanded premises by citizens of the United States, and in conformity to the laws thereof and the local rules, regulations, and customs of the mining district,—one by the grantor of defendant Shea, and the other by the grantors of the defendant California Quartz Mining Company,—and that the locators and the said defendants, as their successors in interest, had ever since held, possessed, and worked their respective claims as mining claims. The case was tried by the court without a jury, and judgment was entered that the defendants above named were the owners and entitled to the possession of their respective mining claims as described, and as to them that the plaintiff take nothing; and that the plaintiff was the owner and entitled to the possession of all the balance of the land sued for as against all of the defendants. From this judgment, so far as it was against her, and from an order denying a new trial, the plaintiff appeals.

The plaintiff claimed title under a patent from the state, issued to

to mining location because withdrawn for "irrigation works" under the act of June 17, 1902, ch. 1093, 32 Stat. 388, and who had remained in possession and worked the claims after the land was restored to public entry were entitled to an injunction against an action of ejectment brought by a grantee of a railway company which got its patent to the land as lieu land after the restoration of the land to the public domain and while the plaintiffs were in possession.

one Banvard, her grantor, in 1870; and the first question is, was title to this land vested in the state at the time of the issuance of the patent? If it was, then the plaintiff was entitled to recover, and if not, we think the proper judgment was entered. Whatever title the state had was acquired under the act of congress of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes." 10 St. U. S. 244. By this act (section 6) it is declared that sections 16 and 36 "shall be, and hereby are, granted to the state for the purposes of public schools in each township." In Higgins v. Houghton, 25 Cal. 253, it was held by the supreme court of this state that mineral lands were not excepted from the operation of the grant of the sixteenth and thirty-sixth sections, made to the state by the act of March 3, 1853, and that as fast as the townships were surveyed the state became the owner of these sections absolutely. And see Wedekind v. Craig, 56 Cal. 642. The rule declared by this court, as above stated, has not been approved by the supreme court of the United States. On the contrary, it was held by that court in Mining Co. v. Consolidated Min. Co., 102 U. S. 167, that the grant of the sixteenth and thirty-sixth sections of public land to the state of California by the act of March 3, 1853, was not intended to cover mineral lands, but that such lands were, by the settled policy of the general government, excluded from all grants. That decision is controlling, and must be followed here.

The question then remains, were the disputed premises at the time of the grant mineral lands,—that is, known to be valuable for minerals? Deffeback v. Hawke, 115 U. S. 404, 6 Sup. Ct. Rep. 95. Upon this question the court below found as follows: "That during all the year 1850, and at the time of the acquisition of the said lands by the government of the United States, and continuously ever since, and on the 10th day of December, 1870, when the said patent was issued to the said E. M. Banvard, and at the time of the survey of the said lands and the return thereof by the said United States, the said east half of the east half of the south-west quarter, and the said west half of the west half of the south-east quarter, of said section sixteen were, and have been, and now are, known public mineral lands of the United States, having therein known valuable mineral deposits, consisting of gravel or placer deposits, and of quartz rock in place, bearing gold in paying quantities, and ever since the 26th day of July, 1866, have been free and open to exploration and purchase, and to occupation and purchase as mineral lands by citizens of the United States, and such as have declared their intention to become such citizens." It is claimed by counsel for appellant that this finding as to the mineral character of the land was not justified by the evidence, and hence that the judgment should be reversed. We do not think this position can be sustained. It is true the evidence was somewhat conflicting, but, taken as a whole, it was amply sufficient, in our opin-

ion, to justify the finding. It is further claimed that the placer mines had been worked out, and the quartz mines abandoned as unprofitable, before 1870, and that there was no evidence showing or tending to show a holding or working of any part of the land at the time of the issuance of the patent in 1870. Conceding this to be so, still it cannot aid the appellant. The grant of the sixteenth and thirty-sixth sections was a grant *in præsenti,* and the only question is, was the land in question known to be mineral in character at the time the grant was made? If it was, the title did not pass to the state, but the state took a right to other land in lieu thereof, and not a right to this land when its minerals should be exhausted. It is also claimed that the defendants were not in a position to attack the patent. But, as we have seen, the state had no title to the mineral land, and passed none to its patentee. The title still remained in the general government, and under its laws the land was open to occupation and purchase as mineral land. The defendants were in possession of their claims under locations which were made in accordance with the law and the local rules and customs. They were therefore in privity with the United States, and had a clear right to contest the patent and assert their rights. At the trial the defendants introduced evidence showing the work done on their claims after their location in 1880. This evidence was objected to by the plaintiff as irrelevant and immaterial, and the objections were overruled, and exceptions taken. The evidence was introduced to show that the claims were still valuable, and to overcome the plaintiff's theory that they were of no value. This, we think, they had a right to do. But, if the rulings were erroneous, the plaintiff was in no way prejudiced by them, as she had no title. It follows that the judgment and order appealed from should be affirmed.

Per Curiam—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.[6]

Section 4.—Mexican Land Grants.

LOCKHART v. JOHNSON et al.

1901. Supreme Court of the United States.
181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. 665.

In error to the Supreme Court of the Territory of New Mexico to review a decision affirming a judgment for defendants in an action of ejectment for mining property. *Modified and affirmed.*

See same case below, 9 N. M. 344, 54 Pac. 336.

[6] On state school land grants, see Costigan, Mining Law, 64–71.

Mr. Justice PECKHAM.[7]—The first question to be determined in this case is one which arises out of the facts set forth in the stipulation between the parties, and that is, Did the lands which the plaintiff claims to recover belong at the time of the location in 1893 to the United States within the meaning of § 2319, Revised Statutes, which provides that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States," etc.?

At the time of the location the record shows the parties believed the land was government land, and not within the limits of any Mexican grant. The stipulation shows, however, that the lands were in fact within the limits of the private land claim known as the Canada de Cochiti grant; that the grant was never confirmed by Congress upon the report of the surveyor general, and that two different sets of claimants under the grant had filed their petitions in the court of private land claims at Santa Fe, one on the 2d and the other on the 3d day of March, 1893; that there was a decree of confirmation rendered by the court on September 29, 1894, and in that decree of confirmation the lands were not included within the boundaries of the grant as confirmed by that decree. An appeal was taken therefrom by all the parties to the Supreme Court of the United States, where it was pending at the time the stipulation was entered into, the appeal being dated March 11, 1895.

It therefore appears that at the time of the discovery and location of the lode in July, 1893, the Cochiti grant was before the court of private land claims for adjudication, and the question is whether by reason of that fact these lands were reserved from entry and were not subject to the mineral laws of the United States at that time. It will be noticed that before the trial of this case the validity and extent of the Cochiti grant had been decided by the court of private land claims, and this land was thereby excluded from the limits of that grant. We know by our own records that the decree of the court of private land claims was affirmed in this court, in substance, in *Whitney* v. *United States,* decided in May, 1897, 167 U. S. 529, 42 L. ed. 263, 17 Sup. Ct. Rep. 857. The contention on the part of the plaintiff in error is that while the Cochiti claim was before the court of private land claims, and thereafter until its final determination by this court, no land within its claimed limits could be entered upon under the mining laws of the United States, and if any such entry were in fact made it was illegal and void, and gave no rights under the mining laws to the parties so entering, and consequently plaintiff's possession was not subject to forfeiture under those laws. In other words, that while the claim was *sub judice* all lands within its

[7] The statement of facts and parts of the opinion are omitted.

limits as claimed were withdrawn and reserved from entry under any of the laws pertaining to the sale or other disposition of the public lands of the United States, and that the plaintiff, being in possession, had the right to retain it as against defendants who entered without right or title, and were therefore mere trespassers.

Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority, either expressed or implied. *Wolsey* v. *Chapman,* 101 U. S. 755, 769, 25 L. ed. 915, 920; *Hewitt* v. *Schultz,* 180 U. S. 139, 45 L. ed. —, 21 Sup. Ct. Rep. 309. We must, therefore, refer to the action of Congress to discover whether lands which in fact were public lands of the United States were reserved from sale or other disposition under its public laws because they were included within the claimed limits but in fact were not within the actual limits of a grant by the Spanish or Mexican authorities before the cession of the territory by Mexico to the United States by the treaty of Guadalupe Hidalgo of February 2, 1848. 9 Stat. at L. 922. The 8th and 9th articles of that treaty provide that the property of every kind belonging to Mexicans in the ceded territory should be respected by the government of the United States and their title recognized.

In 1854 (10 Stat. at L. 308, chap. 103) Congress established the office of surveyor general of the territory of New Mexico, and in the 8th section of that statute it was made the duty of that officer, under instructions from the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico. He was to make a full report of all such claims as originated before the cession of the territory to the United States by the treaty above mentioned, with his decision as to the validity or invalidity of each. This report was to be laid before Congress for such action thereon as it might deem just and proper, "and until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

The Cochiti grant came before the surveyor general pursuant to the provisions of the act of 1854, and therefore by the terms of that portion of § 8, just quoted, the lands were reserved from sale or other disposal by the government until final action by Congress thereon. Up to March 3, 1891, Congress had taken no action in regard to this grant and on that day it passed the act establishing the court of private land claims (26 Stat. at L. 854, chap. 539), and by its 15th section Congress in terms repealed the 8th section of the act of 1854, "and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the

provisions of this act." By this repeal, lands which were in fact public lands belonging to the United States, although within the claimed limits of a Mexican grant, became open to entry and sale under the laws of the United States, unless, as is the contention of plaintiff, such lands were reserved from entry and sale or other disposition by the United States, by reason of the provisions of the treaty with Mexico. We see nothing in the terms of that treaty, either in the 8th or 9th article, that could be construed as a withdrawal of lands which in fact were the public lands of the United States, although contained within the claimed limits of some Mexican grant made prior to the cession to the United States. The mere fact that lands were claimed under a Mexican grant, when such grant did not in truth cover them, would not by virtue of any language used in the treaty operate to reserve such lands from entry and sale. * * *

As we have already stated, there are no words in the treaty with Mexico expressly withdrawing from sale all lands within the claimed limits of a Mexican grant, and we do not think there is any language in the treaty which implies a reservation of that kind. Whatever reservation there is must be looked for in the statutes of the United States, and we are of opinion that there is no such reservation and has been none since the repeal of the 8th section of the act of 1854. * * *

Mineral lands are not supposed to have been granted under ordinary Mexican grants of lands, and the act of 1891 provides that minerals do not pass by such grants, unless the grant claimed to effect the donation or sale of such mines or minerals to the grantee, or unless such grantee became otherwise entitled thereto in law or in equity; the mines and minerals remaining the property of the United States, with the right of working the same, but no mine was to be worked or any property confirmed under the act of 1891 without the consent of the owner of such property, until specially authorized thereto by an act of Congress thereafter to be passed. Section 13, subd. 3, act of 1891. This provision makes it still plainer that, so far as regards mineral lands, there was no intention after the passage of the act of 1891 that they should be reserved by a mere claim in a Mexican grant of ordinary land.

Nor does the claim that the Cochiti grant was *sub judice* at the time of the location of these lands affect their status as public lands belonging to the United States. They were not, in fact, within the limits of the grant.[8] * * *

Nor does the case of *Newhall* v. *Sanger*, 92 U. S. 761, 23 L. ed. 769, apply. In that case it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the railroad, were not embraced in the congres-

[8] On Mexican land grants, see Costigan, Mining Law, 63–64.

sional grant to the company. The decision went upon the ground that the legislation of Congress had been so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim until it was barred by lapse of time or rejected. The act of March 3, 1851 (9 Stat. at L. 631, 633, chap. 41, § 13), which provides for the presentation of claims under Mexican grants in California to the commission established by the act, was referred to by the court, and it was held that by reason of its provisions the lands were not public lands under the laws of the United States until the claims thereto had been either barred by lapse of time or rejected. The 6th section of the act of 1853, March 3 (10 Stat. at L. 244, 246, chap. 145), was also referred to as expressly excepting all lands claimed under any foreign grant or title. There was no such legislation existing in regard to New Mexico at the time of the location of this mining claim, July, 1893. The lands were in fact, and have been since their cession to this country, public lands of the United States, although during the period between the passage of the act of 1854 and that of 1891 they were not open for sale or other disposition while the claims to such lands were undetermined.

Being public land and since 1891 open to location under the mining laws of the United States, it is further contended on the part of defendants that the location of the claim made by Pilkey on July 10, 1893, in behalf of himself and his two partners, Lockhart the plaintiff herein and Johnston, became forfeited by reason of noncompliance with the mining statutes of the United States and also the territory of New Mexico, and that while such failure to comply with the statutes continued, peaceable possession of the land was taken and a relocation made by the defendants, and whatever rights the plaintiff ever had under the first location were thereby cut off. * * *

It is undisputed that the requisite amount of work was not done by the first locator, nor is there any dispute that he left the mine, certainly early in October, 1893, and that there was no one in possession of the land on the 23d of October, 1893, when the above-named defendants entered upon the land, peaceably took possession thereof and made their location, and that in such location Pilkey [plaintiff's partner] did not join, and his name was absent from the notice, and he was not present when possession was taken by the other defendants. * * *

In the courts of the United States in an action of ejectment the strict legal title must prevail, and if the plaintiff have only equities they must be presented and considered on the equity side of the court. *Foster* v. *Mora,* 98 U. S. 425, 428, 25 L. ed. 191, 192; *Johnson* v. *Christian,* 128 U. S. 374, 382, 32 L. ed. 412, 414, 9 Sup. Ct. Rep. 87. The law of New Mexico is to the same effect. N. M. Comp. Laws, § 3160, and following sections.

Whatever the rights of the plaintiff may be (and as to what they are we express no opinion), it is clear that on this record he cannot maintain an action of ejectment. If he have rights as a copartner or cotenant with Pilkey, and he claims that the acts of the latter inure to his benefit in any way, his rights under such circumstances can be enforced in equity. *Turner* v. *Sawyer,* 150 U. S. 578, 586, 37 L. ed. 1189, 1191, 14 Sup. Ct. Rep. 192.

In relation to mining, it has been held that the remedy in the case of a claim in the nature of that which the plaintiff herein sets up, is against the copartner or cotenant, by an action for a breach of his contract or to establish and enforce a trust in the claim as relocated against the parties relocating. *Saunders* v. *Mackey,* 5 Mont. 523, 6 Pac. 361; *Doherty* v. *Morris,* 11 Colo. 12, 16 Pac. 911.

In this case it will be seen that the relocation on behalf of some of the defendants did not contain Pilkey's name, and hence he never had any legal title under that location. He denies that he had any interest in the mine under the relocation, and asserts that it was not made in his interest or for his benefit. Although the plaintiff has no right to maintain this action, yet he ought not to be embarrassed by a judgment here from pursuing any other remedy against the defendants or either of them that he may be advised; and in order to avoid any complication of that nature which possibly might result from an absolute affirmance of the judgment of the supreme court of the territory, we modify the terms of that judgment by providing that it is entered without prejudice to the enforcement by other remedies, of the rights, if any, which the plaintiff may have against the parties defendant or either of them, and *as so modified,* such *judgment is affirmed.*[9]

Section 5.—Homestead Entries.

JAMESON ET AL. v. JAMES ET AL.

1909. SUPREME COURT OF CALIFORNIA. 155 Cal. 275, 100 Pac. 700.

ACTION by J. W. Jameson and another against Mary J. James and others. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

SLOSS, J.—The demurrer of the defendant John P. Cuddeback to plaintiffs' amended complaint having been sustained, and plaintiffs having failed to further amend within the time allowed by the court, judgment of dismissal was entered. The plaintiffs appeal from the judgment.

[9] A trust was established in Lockhart v. Leeds, 195 U. S. 427, 49 L. ed. 263, 25 Sup. Ct. 76.

The amended complaint alleges that on March 31, 1899, the plaintiffs made a mineral location of 40 acres of land in Kern county. The land contained limestone in large quantities, and was far more valuable for said limestone than for any other purpose. Immediately after said location the plaintiffs entered into possession of the claim, and did, in each of the years 1900 and 1901, perform labor thereon and expend money in the improvement thereof, to an amount in excess of the sum required by law. Plaintiffs entered upon said claim in the year 1902 for the purpose of performing the labor and making the improvements required by law, but the defendants forbade and prevented said plaintiffs from performing any labor or making any improvements upon the property. Prior to May 30, 1900, the defendant Mary J. James had made an application to the United States to enter a quarter section of land including the plaintiffs' location, and on April 13, 1900, she made application to the register and receiver of the United States Land Office at Independence to make final proof and payment for said land and to procure a patent therefor. Notice of the applicant's intention to make final proof and of the time when proof would be filed in support of her homestead entry was published by the register in a paper published at Kern City, more than 50 miles distant from the land; there being at the time a newspaper published at Mojave, Kern county, within 17 miles of the place where the land was situated. Plaintiffs had no notice of the application of Mary J. James to enter the land or to make final proof until after hearing had been had and patent issued. It is alleged that said Mary J. James appeared and made proof under her homestead entry, and that patent was issued to her by the United States of date October 23, 1901. At the time that said proof was made, Mary J. James knew that the land contained limestone in large quantities, that said land was more valuable for the limestone than for any other purpose, that said land was claimed by plaintiffs under their location, and that limestone had been developed thereon under said claim. Notwithstanding these facts said Mary J. James, through herself and her witnesses, misrepresented to the officers of the land department the true character and condition of the land and fraudulently concealed the fact that said land was valuable for limestone and the fact that a mining location had been made on said land. These misrepresentations and concealments were fraudulently made for the purpose of obtaining the title to said land and a patent therefor as agricultural land, under the homestead laws of the United States. Plaintiffs allege that when Mary J. James made her original application and entry many years before the final proof, she was not residing on the premises, nor did she ever reside thereon, erect any improvements thereon, except a cabin of the value of $25, or cultivate or improve the land. At the time of making her final proof, however, she testified and represented to the register and receiver

that she had resided upon the land and cultivated and improved the same as by the homestead laws required, and the officers of the land department believed and acted upon her testimony and representations, and the patent was issued upon the faith of said representations. It is further averred that the homestead entry was not made by Mary J. James for her own benefit, but for the benefit of John W. Payne, to whom she conveyed on the day following the making of final proof. The complaint sets forth various conveyances by Payne and by his grantees (all of whom are named as defendants), but alleges that every defendant accepting a conveyance from Mary J. James or her successors took with knowledge of the fraud perpetrated by her. The prayer of the complaint is that the patent be canceled, and that it be adjudged and decreed that the defendants have no right, title, or interest in the land located by plaintiffs. The demurrer is based upon various grounds, but we shall consider only the specification that the facts alleged do not constitute a cause of action.

Under the showing made by the complaint, the defendant Mary J. James did not bring herself within the provisions of the homestead law and was not, in reality, entitled to a patent. By reason of the mineral character of the land, it was not open to entry (Rev. St. U. S. § 2302 [U. S. Comp. St. 1901, p. 1410]), and the conditions of the statutes regarding residence, cultivation, and entry for the benefit of the claimant (Rev. St. U. S. §§ 2289–2291 [U. S. Comp. St. 1901, pp. 1388–1394]) had not been complied with. These facts, if brought to the attention of the proper officers in the proper way, would have afforded good ground for denying her application; but under the legislation providing for the grant by the government of its public lands, the land department has been constituted a special tribunal, "vested with judicial power to determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them." King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29. If the department has jurisdiction—that is, if the land belongs to the United States—and provision has been made by law for its sale, the issuance of a patent is an adjudication that the grantee of the government has performed the acts necessary to entitle him to receive the patent; and, where the power of the land department depends upon its finding that the land is of a certain character, the issuance of the patent is an adjudication that the land is of the character required. Steel v. St. Louis Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Gale v. Best, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44. These adjudications in favor of the patentee have the same force as any adjudication by a tribunal having jurisdiction. They are binding as against collateral attack (see cases above cited), but equity may give relief against the enforcement of rights claimed

under a patent fraudulently obtained. Proceedings based upon fraud in procuring the issuance of a patent have been of two classes. The bill may, while recognizing the validity of a patent as a conveyance of the legal title, seek to have the patentee declared a trustee of such title for the benefit of the complainant, or there may be a suit in which the relief sought is a cancellation of the patent itself.

In the case at bar the plaintiffs do not seek to have the defendants held as trustees of the legal title conveyed by the patent. "The purpose of the suit," as the appellants themselves declare in their brief, is "to cancel the patent * * * and for a judgment that the defendants have no title under or through the patent which was issued"; and, on the facts alleged, it would seem clear that there is no foundation for a decree declaring that the title passing to the patentee is held by her and her grantees in trust for the plaintiffs. Such relief may be granted only where the fraud complained of operated to prevent the complainant from establishing, in the proceedings before the officers of the land department, his own right to a patent. Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed 428; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Carter v. Thomson (C. C.) 65 Fed. 329; Plummer v. Brown, 70 Cal. 544, 12 Pac. 464; Buckley v. Howe, 86 Cal. 596, 25 Pac. 132; Gage v. Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141. It is not claimed by appellants that they, to quote the language of this court in Plummer v. Brown, supra, occupied "such a status as entitled them to control the legal title." They had never performed the acts necessary to vest in them the right to a patent. Furthermore, the original homestead entry of Mrs. James must have been made at least five years before the final proof (Rev. St. U. S. § 2291) and therefore antedated the location upon which plaintiffs rely. So long as the homestead entry, valid on its face, remained uncontested and uncanceled, the land was withdrawn from the public domain and could not be granted by the United States to a subsequent claimant. Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 339; Hastings, etc., R. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; Hodges v. Colcord, 193 U. S. 192, 24 Sup. Ct. 433, 48 L. Ed. 677; Thompson v. Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321.

The plaintiffs then, not being themselves entitled to acquire title to the land, ask that the patent conveying it to defendant James be canceled. That a patent obtained by fraud may be so canceled is well settled; but, inasmuch as the party injured by the fraud is the government, whose title has been improperly obtained, the action to annul the patent can be maintained by the United States alone. A complainant in the position of these plaintiffs, must, as is said in Steel v. St. Louis Smelting Co., supra, "apply to the officers of the government to take steps in its name to vacate the patent or limit

its operation. * * * This can be accomplished only by regular judicial proceedings taken in the name of the government for that special purpose." See, also, Lee v. Johnson, supra; In re Emblen, 161 U. S. 52, 16 Sup. Ct. 487, 40 L. Ed. 613; Emblen v. Lincoln Land Co., 184 U. S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736; Carter v. Thomson (C. C.) 65 Fed. 329.

For these reasons the amended complaint failed to show a case entitling the plaintiffs to any relief whatever.

The judgment is affirmed.[10]

Section 6.—Town Sites.

FEDERAL STATUTE.

That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: provided, that no entry shall be made by such mineral vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral vein applicant.—Act March 3, 1891, ch. 561, § 16, 26 Stat. L. 1101.

BONNER ET AL. v. MEIKLE ET AL.

1897. CIRCUIT COURT, D. NEVADA. 82 Fed. 697.

HAWLEY, District Judge (orally).[11]—This suit was brought in the state court by complainant Bonner on behalf of himself and for the benefit of numerous other persons upon a protest (adverse) made by complainants to an application made by defendants for a patent to the Naid Queen mining location at De Lamar, Lincoln county, Nev., and upon the petition of one of the defendants was removed to this court upon the ground of prejudice and local influence. Bonner v. Meikle, 77 Fed. 485. * * *

The cause was tried before the court, a stipulation having been filed waiving a jury. The ground in controversy is situate upon the

[10] On homestead entries, see Costigan, Mining Law, 83–87.

[11] Parts of the opinion are omitted.

unsurveyed public lands of the United States. The complainants are the owners of, and in possession of, certain town lots, and the buildings erected thereon, in the town of De Lamar, situate within the surface limits of the location of the Naid Queen claim. They have expended over $30,000 in the construction of buildings and making improvements on their land. The notice of the mining location was posted on the ground prior to the entry of complainants upon the land. At the time the notice was posted, no discovery had been made of any mineral-bearing lode or vein within the limits of the location. Section 2320, Rev. St., provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The contention of complainants is that no such discovery has ever been made, but, in any event, that no such discovery was made until long after the rights of complainants had been acquired. In Enterprise Min. Co. v. Rico-Aspen Min. Co., 167 U. S. 108, 112, 17 Sup. Ct. 762, 763, the court said:

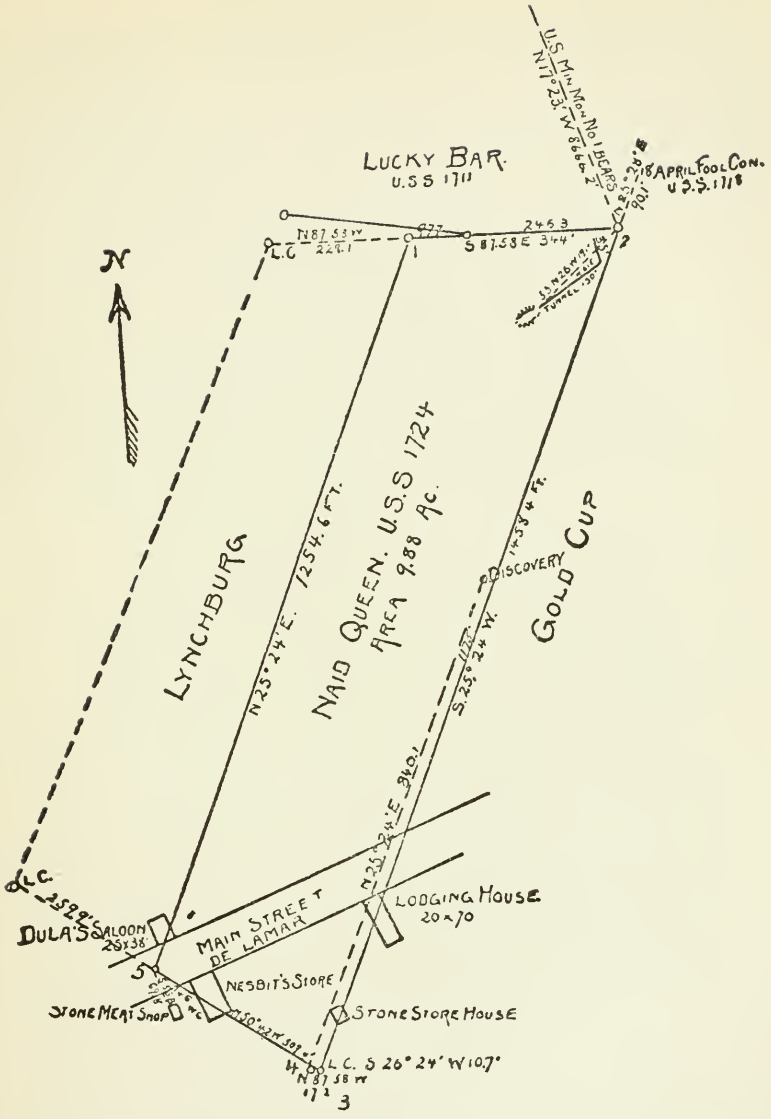
"In order to make a location, there must be a discovery; at least that is the general rule laid down in the statute. * * * The discovery in the tunnel is like a discovery on the surface. Until one is made, there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery, whether such discovery be made on the surface or in the tunnel."

This suit involves a question of fact. If a mineral lode or vein was discovered within the limits of the Naid Queen surface location, running in a parallel direction with the side lines of the location, prior to the entry of complainants upon the town lots, the defendants are entitled to a patent. Was such a discovery made prior to that time? A preliminary objection was urged by defendants' counsel to any consideration of the merits of this case upon the ground that complainants have no standing in court; that they have not established any right to the premises in controversy; and are not, therefore, entitled to protest against the application of defendants for a patent to the Naid Queen mining location, because there had been no action taken by the citizens of the town of De Lamar to obtain title from the United States to the town site. To quote from the argument of counsel: The testimony "does not show that the public authorities have ever made application for it. It does not show that any steps have been taken to comply with the laws of the United States on the part of the complainants, or to acquire by purchase or otherwise from the United States the title which is alleged to be out standing in the government; nor is there anything in the case tha shows that this complainant, or those whom he represents, have nov or expect to obtain this title, or that they have taken any steps to

connect themselves with the government of the United States." It is true that such steps might have been taken by the town authorities, if it has any town organization, or by complainants, to secure title from the government to the land occupied by them; but the fact that no such steps have been taken does not deprive the property owners of the town, or any or either of them, from protesting against the application of the defendants for a patent to the Naid Queen location, which includes the property which they claim to own. The citizens of a town have as much right to build houses upon the public domain in which to live as others have to locate mining claims upon which to work. One purpose is as necessary as the other. Both are entitled to the equal protection of the law. Although complainants have not connected themselves with any government title, nor sought in any manner to secure such title, yet they have such a possessory right to the land upon which their buildings have been erected as will prevent others, not having any title from the government, from entering thereon, and taking their property from them, without first establishing a superior right thereto.

There are many cases where the owners of mining ground valued at millions of dollars have preferred to hold the same under "a mere possessory right" rather than to take any steps to secure a patent from the government. Forbes v. Gracey, 94 U. S. 762, 767. Would it not be absurd to claim that in such cases the owners of the possessory title, under valid mining locations, were not entitled to any protection, and could not even protest against the application of some subsequent locator for a patent covering a portion or all of their ground because they had never taken any steps to secure title to their property from the United States? The argument of counsel would have merit if the complainants were seeking to set aside a patent that had been issued by the United States to the owners of the Naid Queen location. Being simply occupants of and in possession of town lots on the public lands without title, they have no vested rights to this land as against the United States nor any purchaser from them. Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102. But that is not this case. The defendants have no title from the United States. They are not in any better position in this respect than the complainants. It is true that they are seeking to procure the government title; but, in order to obtain a patent, they must first prove that they have a better right to the land than the complainants. The case must be considered upon its merits. * * *

The following diagram shows the location of the ground as shown by the survey made by the United States mineral surveyor in the application made by the owners of the Naid Queen for a patent.



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Taking into consideration all the facts and circumstances testified to by the respective witnesses, and carefully weighing the same, it seems clear to my mind that, whatever the probabilities or improbabilities of the continuance of mineral-bearing quartzite and rock in place through the Naid Queen lengthwise at the present time may

be, there was not, at the time the complainants took up, purchased, or secured the town lots upon which their respective buildings are erected, any such discovery of mineral-bearing earth, rock, or ore within the limits of the Naid Queen location as would give to the owners of such location a prior right to the ground and premises occupied by the complainants herein. It must be borne in mind that this is not a contest between two mining companies, both claiming the ground as mineral land, and each claiming to be the first locator, or the first to discover rock in place bearing mineral. In all such cases the question as to what constitutes a discovery of a vein or lode under the provisions of section 2320, Rev. St., is governed by the rule announced in Book v. Mining Co., 58 Fed. 106, 121, that, when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. This rule has always prevailed in the courts, as is clearly shown in the numerous authorities there cited. See, also, McShane v. Kenkle (Mont.) 44 Pac. 979, 981. Why? Because it was never intended that the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode. But where the rights of claimants to a town site, or to agricultural land, or as between the locators of a placer claim and others claiming a vein or lode to the same ground, are involved, other questions must be considered. In all such cases there are different statutes to be construed, and a somewhat different rule prevails. This is clearly stated by the court of appeals of this circuit in Migeon v. Railway Co., 23 C. C. A. 156, 77 Fed. 249, 256. In a case of contest between mineral claimants on one side and parties holding town-site patents on the other the supreme court has repeatedly declared that under the acts of congress which govern such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time be known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. Deffeback v. Hawke, 115 U. S. 393, 404, 6 Sup. Ct. 95; Davis v. Weibbold, 139 U. S. 507, 525, 11 Sup. Ct. 628; Dower v.

Richards, 151 U. S. 658, 663, 14 Sup. Ct. 452. In Davis v. Weibbold, the court, after announcing the rule as above stated, said:

"In connection with these views it is to be borne in mind, also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands by giving title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade, and manufactures. It would, in many instances, be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and, being thus subject to indiscriminate invasion, the land would be, to one having the title, poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of congress, or that any construction should be given to the provision in question which would lead to such results."

I am of opinion that those cases, and the principles therein announced, are applicable to this case. It is true that no steps have even been taken by the town-site claimants of De Lamar to obtain a town-site patent in order to procure a title from the government. They might have done so; and, if they had, then the mineral claimants to the Naid Queen mining location could have protested, and the identical question here raised would then have been presented. The fact as to which party first applies for a patent certainly cannot make any difference in the principle which is involved.

It was argued by counsel for complainants that, if any discovery of a lode or vein was made in the Naid Queen location, it was a vein that ran in an easterly and westerly direction at the northerly end of the location. It was also claimed that the application for a patent by the defendants was not made in good faith for the purpose of procuring a patent to mining ground for mining purposes, but was an attempt to obtain a patent for the sole purpose of getting title to the town lots and buildings in possession of the complainants. It is undoubtedly true that in a case like the present, where complainants acted in the utmost good faith in locating upon or purchasing the town lots upon which their improvements are made, under the belief that the land was not mineral, their rights ought not to be disturbed without clear and satisfactory proof that within the limits of the mining location there had been found a lode or vein which, in its natural course and direction, would give the owners thereof a right to all the surface ground within the limits of the location. In other words, if the proofs were undisputed that a discovery of a lode or vein had been found at the northerly end of the Naid Queen location; that from such discovery it clearly appeared that the course

of the lode lengthwise was easterly and westerly, and at right angles within the side lines of the Naid Queen,—then, in the eye of the law, the side lines of the location as made upon the ground would become the end lines of the location (King v. Mining Co., 152 U. S. 222, 228, 14 Sup. Ct. 510; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 687, 15 Sup. Ct. 733), and the owners of the claim would only be entitled to a patent for 300 feet of surface ground on each side of the middle of the lode; and hence it would not interfere with complainants' rights. There is more or less testimony that tends to support that theory, but the views already expressed are decisive of the case, and render it unnecessary to decide other questions raised by counsel. The defendants are not entitled to a patent for any part or portion of the land claimed and occupied by the complainants. The complainants are entitled to judgment for their costs. Let a decree be entered accordingly.[12]

GOLDEN v. MURPHY et al.

1909. Supreme Court of Nevada. 31 Nev. 395, 103 Pac. 394.

Action by Frank Golden against J. C. Murphy and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Norcross, C. J.[13]—* * * Upon a second trial of the case with a jury a verdict was rendered upon general and special issues in favor of the plaintiff and for $500 damages; judgment and decree entered accordingly, and for a perpetual injunction. A motion for a new trial was denied. From said judgment and decree, and from the order overruling the motion for a new trial, the case again comes to this court upon appeal. * * *

The action was brought to recover damages in the sum of $7,000 for the extraction of ores by the defendants Murphy and Byers within the exterior lines, extended vertically downwards of the Table Mountain mine, a patented claim, upon a part of which they held a lease from the then owner, the said Royal Mining Company; also for an injunction restraining the defendants from the further working upon the ledge, which plaintiff alleged has its apex upon the Canyon mining claim, claimed to be the property of the plaintiff. * * *

The issues raised by the amended pleadings were the same as at the first trial, with the exception that the defendants by their amended answer attacked the validity of the canyon mining claim, and hence the right of the plaintiff to base any extralateral or other

[12] On townsite entries, see Costigan, Mining Law, 95–102.
[13] Parts of the opinion are omitted.

rights thereon, by reason of the alleged fact that the ground covered by the said Canyon mining claim was embraced within the original town-site patent of Silver City.

The allegations in the several answers of the defendants respecting the Silver City town site and the invalidity of the Canyon location are as follows: "(a) This defendant denies that plaintiff now is, or ever was, the owner of, or ever entitled to the possession of, the mining claim described in the complaint, situate in the Devil's Gate and Chinatown mining district, Lyon county, Nev., or any part thereof. And in connection herewith this defendant avers that in the year 1884 one W. J. Westerfield, being one of the predecessors in interest of plaintiff, made a location of the Canyon mining claim described in the complaint, but that at said date the land upon which said location was made had been conveyed by patent to William Hayden, district judge of the state of Nevada, Lyon county, as trustee in trust, granting a town site to the inhabitants of Silver City, Lyon county, Nev., and that such attempted location by said W. J. Westerfield gave him no color of title to said mining claim, or any part thereof, either express or implied, that said Silver City town site was sold by the government of the United States, as aforesaid, on or about June 26, 1868, under the act of Congress of 1867, and that the declaratory statement was filed on or about December 2, 1867, and that the patent of the United States was issued to said William Hayden in trust as aforesaid, on or about September 20, 1873, and to the successors of said William Hayden, and that on or about May 8, 1876, the successor of said William Hayden sold and conveyed to one Joseph Angell and Joseph Monckton lot No. 268 of said patented town site, and on or about the same day said successor of said William Hayden sold and conveyed to one W. C. Dovey, lots Nos. 267 and 269 of said town-site patent, which said lots cover all of said Canyon mining claim attempted location. (b) Defendants are informed and believe, and upon their information and belief allege the fact to be, that on the date September 20, 1873, being the date of the issuance of the Silver City town-site patent above described, the land described in the complaint as the Canyon mining claim was not a valid, existing, located mining claim, and that at said date said land was not known to be valuable for its minerals, and that subsequently and on or about the 8th day of March, 1876, one A. W. Piper and T. S. Davenport attempted to make a location of said mining ground, and called it the Richmond G. & S. M. Co., and that said ground at said time belonged to the Silver City town site, and was not locatable, and that on or about the 1st day of January, 1884, said Piper and Davenport abandoned and forfeited their said attempted location, and that 2 months and 21 days thereafter, being on the 21st day of March, 1884, one W. J. Westerfield, predecessor in interest and grantor of plaintiff, Frank Golden, attempted to make a relocation of said Richmond G. & S.

M. Co. claim, and after going through the acts of location, called it the Canyon mining claim, and that all such attempted locations and acts are contrary to law, and without right." The only amendment to plaintiff's complaint was in reference to paragraph 3, which, as amended, reads as follows: "That for over 10 years immediately preceding the acts hereinafter complained of, the plaintiff and his grantors was the owner of, and entitled to, the possession, and in the quiet and peaceable possession of the said Canyon mining claim, and the ledge thereon."

The allegations contained in defendants' answers relative to the issuance of the town-site patent to Silver City and the subsequent sale and conveyance of lots within said town site covering the land embraced within the boundaries of the Canyon mining claim were established by documentary proof. The record of location of the Canyon mining claim shows that it was located by W. J. Westerfield, March 21, 1884. The record is designated "Notice of Relocation," and in the body thereof the following statement appears: "This is a relocation of the Richmond G. & S. M. claim and shall be known as the Canyon G. & S. M. claim. The said Richmond G. & S. M. Claim not having had the necessary amount of labor or improvements made or expended thereon as required by the laws of the United States. This claim is situated in the Devil's Gate and Chinatown mining district, Lyon county, state of Nevada." The Richmond G. & S. M. claim is shown to have been located March 8, 1876. * * *

The record shows without question that the ground embraced within the boundaries of the Canyon claim had been held as a mining claim from the date of the location of the Richmond G. & S. M. claim, March 8, 1876. The plaintiff and his grantor asserted rights to the Canyon claim as a relocation of the Richmond G. & S. M. claim. As relocators, they recognized the validity of the prior location, which, having become subject to forfeiture, was forfeited by relocation.

Plaintiff's right to the ground covered by the Canyon claim, regardless of whether or not it was subject to location as a mining claim, may be supported by adverse possession alone. Such possession would give him all ledges or veins apexing within the boundaries of the claim, and the right to follow them within his side lines, extended vertically downwards, but whether such adverse possession would carry with it extralateral rights, in the event the ground passed to the town site for town-site purposes under its patent, is a question, and one which we do not find to have ever been passed upon. As the validity of plaintiff's location can be determined upon other facts of the case, we shall not now attempt its solution. If the ground in question never passed under the town-site patent, then it is not questioned but that the plaintiff is entitled to any extralateral rights which he may have established by proof

in this case. The reservation in the town-site patent is in accordance with the provisions of the Acts of Congress of March 2, 1867, c. 177, 14 Stat. 541, and of June 8, 1868 (chapter 53, 15 Stat. 67), as united and incorporated into section 2392 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1459), which reads as follows: "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws."

Counsel for appellants urges that the evidence shows without conflict that the land embraced within the Canyon claim was not known to be valuable for its minerals prior to, and at the time of, the issuance of the town-site patent, and hence that it passed to the town site under the patent, and, having so passed, no valid mining claim could be initiated thereon. In support of this position counsel cites and relies upon a number of decisions of the Supreme Court of the United States, and particularly the cases of Davis v. Weibbald, 139 U. S. 520, 11 Sup. Ct. 628, 35 L. Ed. 238, Dower v. Richards, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305, and Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423. The cases supra were in each instance controversies growing out of conflicting claims to the ground between holders of town-site lots under the town-site patent and mining claimants, whose alleged rights to the ground were in some instances based upon mining locations instituted subsequent to the town-site patent. This case presents a different situation, particularly from the fact that it is not a controversy between the town-site lot owners and a mineral claimant.

A reading of the statute discloses that not only "any mine of gold, silver, cinnabar or copper" is exempted from the provisions of the statutes, but, in addition, the exemption extends to "any valid mining claim or possession held under existing laws." There is evidence in this case that the ground covered by this Canyon location was covered by mining claims as early as 1860, and located and relocated thereafter and held as mining ground ever since. There is evidence to the effect, and counsel for appellant concedes, that the Canyon claim was "well-known mining ground" at the time of the issuance of the town-site patent, but he contends that it was not known to be valuable for mining purposes, and hence would not be exempt from the town-site patent. It is true, however, that the mining claimants have never had their possession disturbed by any one claiming under the town site. The location of the Richmond G. & S. M. claim antedates the sale of the town lots, under the town-site patent, covering the same ground, and it does not appear that the town-site lot purchasers ever successfully or at all, disputed the title of the locators of the mining claim. * * *

It is clear from the language used in the statute, and from the

opinions expressed by the Supreme Court of the United States, particularly in the Davis v. Weibbald Case, supra, that land, held as a valid and subsisting mining claim at the time of the issuance of the town-site patent, does not pass under such patent, nor is the title or right of possession of the location at all affected thereby. "As said in Belk v. Meagher, 104 U. S. 279, 283, 26 L. Ed. 735: 'A mining claim perfected under the law is property, in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government." Noyes v. Mantle, 127 U. S. 353, 8 Sup. Ct. 1134 (32 L. Ed. 168). "A valid mining claim can only be based upon a discovery within the limits of the claim, and the existence of mineral in such quantities as to render the land more valuable for mining than for any other purpose, or as will justify a prudent man in the expenditure of time and money in its exploration and development." Lindley on Mines, § 176.

It may be seriously questioned whether a discovery, sufficient to support a valid mining location so as to exempt such location from the provisions of a town-site patent, could be held to the same degree of strictness as would be required in the case of a mine known, or claimed to be known, to exist at the time of the issuance of such town-site patent, but which had not previously been located. In the case at bar, while it appears that the ground embraced within the Canyon claim was sold as town lots under the town-site patent, it does not appear that the lot purchasers ever acquired, or attempted to acquire, possession from the claimants to the ground under prior existing mining locations. The evidence is conclusive, we think, that the ground covered by the Canyon claim has been held as a valid and subsisting mining claim from a time long prior to the date of the town-site patent down to the present. No one in a position to question the right of the plaintiff, his grantor, and prior locators of the ground covered by the Canyon claim to hold the same as mining ground, have ever established, or attempted to establish, so far as the record shows, a superior right to the ground. Under this state of facts it follows as a matter of law that the Canyon mining claim is a valid mining claim unaffected by the town-site patent. * * *

4.* * * Counsel for appellant contends, as a matter of law, that "no extralateral right can legally exist through a mineralized hanging and foot-wall formation, which is sufficiently mineralized to sustain a mining location, and to induce the miner and prospector to expend his time and money in the exploration thereof, even though scientists and geologists and hired experts might find sufficient provocation to swear that they detect walls to any formation which they call an independent vein coursing through such mineralized formation." We do not think counsel's contention can be supported as an inflexible rule of law. We think counsel fails to

distinguish between what is sufficient in the law to constitute a discovery sufficient to support a valid location of a mining claim and what constitutes a vein having defined walls, and to which extralateral rights attach. If we understand counsel correctly, he takes the position that there is no distinction, and in this we think he is in error. Suppose a vein containing valuable ore has well-defined wall, which are themselves but a part of a mineralized zone, which carries small values, and which in places contains seams of quartz sufficiently valuable to support a mining location, can it be said that such vein cannot be regarded as separate and distinct from the mineralized zone? We think it cannot be so said. What may constitute a discovery sufficient to validate a location may be, and frequently is, a very different thing from what constitutes an apex of a vein which will entitle the owner thereof to extralateral rights. * * *

The mineral zone in question in this case is described as country rock cut by a series of independent ledges of an approximately parallel dip, any one of which ledges has its entire system of walls. Within this country rock comprising the mineral zone, at "wide intervals, as you would find in the bedding and cracks of any rock," are found "quartz seamlets." The fact that the Canyon ledge passes through a mineral zone of this character does not, we think, make it an inseparable part of the general mass of rock comprising the zone, but upon the contrary, that it may be regarded separate and distinct therefrom, and may be followed upon its dip. In the former appeal of this case, we said: "If small pieces of quartz, narrow seams, and little pockets of ore embodied in porphery be deemed sufficient to sustain a location, we do not understand that they give the owner any greater rights against veins apexing on other claims dipping under this ground than he would have if his location were based upon a substantial and well-defined ledge." * * *

The record contains a number of other assignments of error, but the view which we have taken upon the main questions heretofore considered makes it, we think, unnecessary to consider them.

The judgment and order appealed from are affirmed.[14]

Section 7.—Mill Sites.

FEDERAL STATUTE.

SEC. 2337. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same.

[14] On rehearing the conclusions reached were adhered to. See Golden v. Murphy, 31 Nev. 395, 105 Pac. 99.

must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section. Rev. St. U. S. § 2337.

CLEARY v. SKIFFICH ET AL.

1901. SUPREME COURT OF COLORADO. 28 Colo. 362, 65 Pac. 59.

ACTION by Simon Skiffich and another against Reuben St. J. Cleary. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

The subject-matter of controversy in this case is the area in conflict between the Zara lode-mining claim and the Arrighi mill site. Application for patent having been made for the latter, the owners of the lode claim filed an adverse, and in support thereof commenced this action against the applicant for patent on the mill site. The judgment below was in favor of the plaintiffs. The defendant appeals.

GABBERT, J.[15]—* * * A plea of defendant was also interposed to the effect that the land described in the complaint was not, at the time it was located as a lode claim, subject to location, for the reason that it was then actually occupied for a mining purpose by the defendant. On motion of plaintiffs, this plea was stricken out. It is urged by counsel for defendant that title to a mining claim cannot be initiated by a trespass. The lode claim was discovered without the lines of the mill site. Its boundaries, as fixed, did embrace a portion of the latter. These facts appear from the pleadings. In such circumstances, the act of the plaintiffs in projecting the boundaries of their claim so as to include a part of the mill site was not a trespass, and the motion to strike was well taken.

The mill site was located in 1860, and ever since that date, down to the time of the location of the lode claim, in 1895, was in the uninterrupted possession of the defendant and his grantors, who had erected a three-stamp mill thereon about the time of the location, which was subsequently enlarged, and has been operated from the time of its construction. Over $16,000 has been expended by defendant and his grantors in the way of improvements. The jury found that the vein of the lode claim intersected the mill site. There is no question that a vein was discovered on the lode claim upon which its location is based, and that such vein carries mineral in appreciable quantities. The vein in question appears to have been known since about 1884, but no ore has ever been shipped therefrom, nor has there ever been any attempt to operate it as a mine. Its values are shown by assays only, which, with one exception, established that

[15] A part of the opinion is omitted.

they are merely nominal. The mill site is not located in connection with any mining claim. The district rules in force in the Enterprise mining district in which the property in controversy is situate, passed in 1860-61, provided for the location of mill sites, and that locations for this purpose shall be valid as against all other classes of claims. The mill site in question was located under these rules, and in compliance with their provisions. The court instructed the jury, in substance, that it is sufficient if the discovery shaft discloses a vein or crevice such as a miner would be willing to open or follow, that it made no difference what the size or value of such vein might be, that nonmineral land only can be taken for mill-site purposes, and that, in case of adverse suit by a lode-mining claim against a mill site, the latter must give way to the former, provided it is shown that the vein crosses or intersects the mill site, and it is further shown that the lode claim is a valid, subsisting location. On behalf of the defendant the court was requested to direct the jury that a lode claim, under the terms of the act of congress authorizing its location, must be upon a valuable mineral deposit, which was refused. On this record, counsel for defendant contend (a) that a mill site of the class under consideration need not necessarily be located upon nonmineral ground; (b) that, as against the mill site, the ground in controversy could not be held as a mining claim unless it appears that it contains mineral sufficient in quantity and quality to justify extraction; (c) that, under the district rules of Enterprise mining district, defendant has a vested right to the mill site.

(a) For the location of mill sites, congress has provided that nonmineral ground not contiguous to a lode claim, and used or occupied by the owner of such claim for mining or milling purposes, may be included in the application for patent to his lode claim, and patented in connection therewith, and also that the owner of a quartz mill or reduction works, not owning a mine in connection therewith, may obtain patent for his mill site. Section 2337, Rev. St. U. S. Under this section it is contended that the latter class of mill sites may be patented on mineral land. This view is not tenable. The object of the law is to permit title to land to be acquired for mill sites located on mineral lands which do not contain valuable mineral-bearing veins or mineral deposits. There is no reason for a distinction on account of the character of use, or the ownership or non-ownership of a mine in connection with a mill site. The land department has uniformly held that a mill site cannot lawfully be located on mineral land, without any attempt to distinguish between the two classes. 1 Lindl. Mines, § 520.

(b) The definition of a vein, as given by the trial court, is a general one frequently adopted in contests between conflicting lode claims. Like all general rules, it must be reasonably applied; for cases will arise, under peculiar facts, which create an exception. A

mill site is a mining location, but the land which may be taken for that purpose is of a special character. The statute contemplates that title to lands for mill sites may be secured which are prima facie mineral, but which in fact are nonmineral, so the question presented is, what is the test by which to determine whether land so claimed is nonmineral or not, when a contest arises between a mill-site location and a lode claim subsequently located? Where lands designated as mineral have been claimed and located as agricultural, it has been held that the mere presence of gold in placer deposits, or the existence of a vein within the limits of the land so claimed, would not impress it with the character of mineral land. U. S. v. Reed (C. C.) 28 Fed. 482; Ah Yew v. Choate, 24 Cal. 562; Alford v. Barnum, 45 Cal. 482; Etling v. Potter, 17 Land Dec. Dep. Int. 424; Cutting v. Reininghaus, 7 Land Dec. Dep. Int. 265; Peirano v. Pondola, 10 Land Dec. Dep. Int. 536. Contests have frequently arisen between placer and subsequent lode locations involving the question of whether or not the placer embraced within its limits "known lodes," which, under the provisions of section 2333, Rev. St. U. S., are excepted from placer patents. In such cases it has been held that a known lode is one known to exist at the time of application for patent, and to contain minerals in such quantity and quality as to justify expenditures for the purpose of extracting them. Railroad Co. v. Migeon (C. C.) 68 Fed. 811; Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201; Brownfield v. Bier (Mont.) 39 Pac. 461. In many other cases the question as to what constitutes mineral lands, as between the different classes of locations which may be made upon lands of that character, has been presented for determination, either before the courts or the land department; and, as to grants previously made, the holding has uniformly been that it is not every crevice or outcropping on the surface which suggests the possibility of mineral that can be adjudged a known vein or lode, within the meaning of the statute, but that, in addition to this fact, it must appear that such lands embrace veins known at the time of the grant thereof to be sufficiently valuable for minerals to justify expenditures for their extraction. Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., supra; Dower v. Richards, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305; Davis v. Wiebbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423. These decisions are based upon the proposition that one claiming land as a mining location from which to extract minerals must establish, as against a prior location of another class, that the ground so claimed is valuable to operate as a mine, and, unless this does appear as a fact, he will not be permitted to take it from another who has previously located it in good faith for a different purpose. It has also been held, when this question was presented, that it is one of fact,

to be determined by the jury before the nisi prius court. Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., supra. This necessarily follows in actions brought in support of an adverse claim against an application for patent in those cases where by virtue of the provisions of sections 2325, 2326, Rev. St. U. S., an adverse is the remedy, instead of a protest, because the right of possession of the contesting parties turns upon the character of the land in controversy. The same principle and reasons which have been applied in determining the rights of rival claimants of land for agricultural or mining purposes, or as placer or lode claims, should control and determine the rights of contestants to the same premises when one claims as a mill site, and the other as a subsequent lode location. It is a well-known fact that lands designated "mineral" contain precious metals in small quantities, but not sufficient to justify the expense of attempting to extract them. It is not to such lands that the term "mineral," in the sense of the statute relating to mill sites, is applicable. Davis v. Wiebbold, supra. Works for the reduction of ores are necessary. They must be located in the near vicinity of mines. Land for such purposes may be utilized, provided it is nonmineral. When that question is raised by those locating a lode claim embracing land already taken as a mill site, and upon which many thousands of dollars have been expended in the erection of mills, and which the claimant has taken up in good faith, the test must be, does such land contain minerals of a quantity and quality which can be extracted at a profit? 1 Lindl. Mines, § 98. If not, they are valueless for the extraction of minerals, and therefore nonmineral in their character, when previously claimed as a mill site. In such circumstances, that they are mineral must be established as a fact, and not as a theory. Dughi v. Harkins, 2 Land Dec. Dep. Int. 721. To permit a claimant, under the guise of locating a lode claim, to take from another land already utilized for mill-site purposes which contain no minerals of sufficient value to justify extraction, and which would give to the lode claimant that which is of no value to him, except as he may convert it into a means to extort from the mill-site owner the payment of money to prevent the loss of improvements erected in good faith, would certainly be inequitable and unjust. The clear intent of congress was to permit the acquisition of title to land for mill-site purposes which was not valuable for mines, and the statute should be given this construction when it results in no loss to a subsequent bona fide lode claimant. Any narrower construction would result in rendering titles to mill sites previous to patent insecure, and the expenditure of money thereon in the erection of reduction works hazardous in the extreme, and at the same time reserve from use for mill-site purposes land which was of no practical value for any other.

In the circumstances of this case there is also presented for determination this further proposition, namely, as of what date must

the mineral character of the mill site be ascertained? When the validity of a grant depends upon certain conditions, it is the rule that such conditions are those existing as of the date the grant took effect. Davis v. Wiebbold, supra; Railroad Co. v. Migeon, supra; U. S. v. Reed, supra; Brownfield v. Bier, supra. Under the rules of the land department, where the application is for patent for a mill site only, as in this instance, there must be a mill or reduction works on such premises. In re Le Neve Mill Site, 9 Land Dec. Dep. Int. 460; 1 Lindl. Mines, § 524. A mill-site claimant would certainly have a reasonable time after taking the necessary steps to legally locate his claim, within which to commence the erection of reduction works thereon. If not commenced within a reasonable time, then his rights would attach, as against other claimants, from the time he did begin construction of such works in good faith, and prosecuted them with reasonable diligence. Having vested and continued, the character of the land must be determined of the date his rights attached. The fact that such lands might contain mineral deposits which at a later date, by reason of changed conditions, could be mined at a profit, would not affect his rights. See authorities last above cited. The rights of the parties were therefore dependent upon the questions of fact presented by this proposition. Unless the premises in dispute did in fact contain mineral deposits of a value and quantity which, under the conditions existing at the time when the rights of the original owners of the mill-site premises attached, could have been extracted at a fair mining profit, they were nonmineral in character, and the jury should have been instructed accordingly. 1 Lindl. Mines, §§ 94–98.

(c) The district rules of Enterprise mining district, passed in 1860–61, provided for the location of mill sites without respect to the character of the land upon which they might be located. The territorial legislature in 1868 declared that all rights to any portion of the public domain acquired prior to the 7th day of November, 1861, should be determined by the local law of the district in which such tract was situate, as it existed on the day such rights were acquired, or as thereafter may have existed. Section 3609, Mills' Ann. St. When congress passed the present law relating to mining claims, all rights to such lands were recognized to the extent that they had attached or been acquired under local rules or customs not inconsistent with the laws of the United States. Section 2319, Rev. St. U. S. The same act, as already noticed, provided that mill sites could only be legally located upon nonmineral lands. Section 2337, Id. Hence the rules of the district relating to the location of mill sites and the acts of the territorial legislature must yield to the act of congress, in so far as they relate to the location of such sites upon mineral lands, for in this particular they were inconsistent with the congressional act.

By supplemental brief filed on the part of appellant, two further

propositions are advanced: (1) That the court erred in refusing to instruct the jury to the effect that the location of a mining claim must be upon the unappropriated public domain of the United States, and that, plaintiffs having failed to offer any evidence on that point, they are not entitled to a verdict. (2) The court erred in refusing to instruct the jury that if it appeared from the evidence that defendant and his grantors were in the actual possession of the mill site at the time of the location of the Zara lode, claiming to own the same, and operating the mill by using water from the creek through a ditch across the mill site, such use and occupation would give defendant the better right to the premises in dispute.

All the acts necessary to constitute a valid location of the lode claim were put in issue by the answer. The court instructed the jury, in substance, that a location of a mining claim must be made upon unoccupied public domain; but, as there was no testimony offered on the part of plaintiffs to prove that their location was upon unappropriated mineral lands, the court should have given the instruction requested by defendant, and advised the jury that, in the absence of evidence on this point, the plaintiff could not recover.

The next proposition is based upon the theory that as defendant had established a vested right to the use of water flowing in the creek upon which his mill site is situate, and across which a ditch is constructed for the purpose of utilizing such water, he was entitled to hold the ground in controversy, for the reason that the grant of the water carried with it all incidentals necessary to its complete enjoyment, and therefore the land upon which the mill was situate; it being the means through which such water is beneficially used. In support of this proposition, sections 2339, 2340, Rev. St. U. S., are relied upon, which provide, in substance, that whenever rights to the use of water for mining purposes have vested, and are recognized by the local customs, laws, and decisions of the courts, the owners of such rights shall be protected in the same, and the right of way for the construction of ditches for the purpose of utilizing such water is confirmed. All patents shall be subject to vested water rights or ditches used in connection therewith. The theory of counsel for defendant is that privileges and appurtenances properly belonging to the thing granted pass with it, and, therefore, the right to the use of water being established, sufficient land passed with that right upon which to beneficially apply the water so appropriated. It is true that the grant of a particular piece of property, in the absence of any limitation, carries with it those appurtenances necessary to the beneficial enjoyment of the property granted, which it is within the power of the grantor to convey. An appurtenance is that which belongs to something else as an adjunct or appendage of such moment that the thing to which it attaches cannot be enjoyed without its use. It is therefore limited to that which is necessary to the enjoyment of the principal thing granted. Nichols v. Luce,

24 Pick. 102, 35 Am. Dec. 302. The appurtenance which could pass by virtue of the grant to a right to the use of water would be that necessary to its utilization, so that it could be applied to the purpose for which it was appropriated. The right might become appurtenant to that in connection with which it was beneficially used, but the latter could not be appurtenant to such right. It might as well be argued that, because a vested right to the use of water had been acquired for irrigation purposes, there attached to such right, as an appurtenance, land upon which to apply the water, as to say, as in this instance, there passed with the water right land in connection with which such water was utilized. The appurtenance attached to the water right of defendant is the right of way for the ditch through which the water is diverted. That is not in controversy. The laws of the United States protect this right. If plaintiffs should obtain a patent to the lode claim, it would be subject to such right. The judgment of the district court is reversed, and the cause remanded for a new trial in harmony with the views herein expressed. Reversed and remanded.[16]

[16] In Hartman v. Smith, 7 Mont. 19, 14 Pac. 648, 651, Galbraith, J., for the court, said: "The validity of the mining location is admitted, and it is not claimed that it has been abandoned or forfeited. The preliminary requirements of the statute, as to survey and notice, as to the mill-site, have been complied with. It is non-contiguous to the mining claim. The mill-site is therefore properly appurtenant to the quartz lode mining claim.

"The location of the town-site was made subsequent to that of the mill-site and mining claim. The act of congress relative to town-sites provides that 'no title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim, or possession held under existing laws.' Rev. St. U. S. § 2392. The above section 2337 of the statute, by requiring the mill-site to be included in the application for a patent for the vein or lode, and that the same preliminary steps, as to the survey and notice, shall be had, as are applicable to veins or lodes, and that it shall be paid for at the same rate per acre as the mining claim, and may be patented with the vein or lode to which it is appurtenant, recognizes the mill-site as a mining possession. The location of the mill-site, perfected according to law, like that of a quartz lode mining claim, operates as a grant by the United States of the present and exclusive possession of all the surface ground included within its limits. Having been used for mining purposes, in connection with the mine, it has not been abandoned or forfeited. It is therefore comprehended within the above section 2392, and is reserved from sale.

"The patent for the town-site, in so far as it included the mill-site, is therefore void, and the patent therefor should be issued in connection with that for the mining claim."

In Morrison's Mining Rights, 14 ed., 273, is the following comment: "In Hartman v. Smith, 7 Mont. 19, 14 Pac. 648, it was held that a mill-site was a mining claim and as such excluded from a town-site patent. In Cleary v. Skiffich, 28 Colo. 367, the court says: 'A mill-site is a mining location.' In the latter case the expression is a mere introductory clause. But to chance the exclusion from a town-site patent to [of] a mill-site claim on the forced or technical meaning of one word, would be to assume grave risk."

On mill-sites, see Costigan, Mining Law, 225–231.

CHAPTER X.

OIL, GAS AND OTHER MINING LEASES.

Section 1.—The Property Rights of Lessees Under Oil and Gas Leases.[1]

HUGGINS ET AL. v. DALEY.

1900. CIRCUIT COURT OF APPEALS. 40 C. C. A. 12, 99 Fed. 606.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

[1] On the nature of the property in oil and gas while in the ground, see Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074; People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. 59, and Ohio Oil Co. v. State of Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. 576. In the last named case Mr. Justice White for the court pointed out that "Whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. It being true as to both animals *feræ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the law-maker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 L. ed. 793, 795, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property.

BRAWLEY, District Judge.[2]—This is an appeal from the circuit court of the United States for the district of West Virginia. The appellee filed a bill in equity alleging that one A. P. Hodges had obtained from F. P. Marshall a lease for oil and gas upon a certain tract of 50 acres of land situated in Ritchie county, W. Va., which had been assigned to him, and that subsequently said Marshall had leased the identical premises to J. J. and J. B. Huggins; and the prayer of the bill was that the said Huggins' and their associates should be restrained in prosecuting the work for developing said leasehold for oil, and that a receiver be appointed to take possession of said leasehold premises and operate the same, and that a decree should be entered canceling said lease as a cloud upon the title of the appellee.

Marshall was an illiterate farmer, the owner in fee of the tract of land described; and on March 12, 1897, he entered into an agreement, under seal, of which the substantial parts are as follows:

In consideration of one dollar paid by Hodges, the lessee, the lessor "does hereby grant, demise, and let unto the said lessee all the oil and gas in and under the following described tract of land, and also said tract of land for the purpose of operating thereon for oil and gas, with the right to use water therefrom, and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and waiving all rights to claim or hold any of the property or improvements placed or erected in and upon said land by the lessee as fixtures or as part of the realty."

Then follows the description of the land. The habendum clause is as follows:

"To have the same unto and for the use of the lessee, his executors, administrators, and assigns, for the term of 5 years from the date thereof, and as much longer as oil or gas is found in paying quantities thereon, not exceeding

But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by thing *ferœ naturæ*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed." On natural gas as property, see also West v. Kansas Gas Co., 221 U. S. 229, 31 Sup. Ct. 564.

[2] Parts of the opinion are omitted.

the term of 35 years from the date thereof; yielding and paying to the lessor the one-seventh part or share of all the oil produced and saved on the premises."

Then follows a further description of the method of delivering the oil into tanks, and a reservation of gas for the personal use of the lessor, and a proviso which is in the following terms:

"Provided, however, that a well shall be commenced upon the above-described premises within 30, and completed within 90, days from the date hereof; and, in case of failure to commence and complete said well as aforesaid, the lessee shall pay to the lessor a forfeiture of $50."

This lease was not recorded until April 8, 1898. At the same time was recorded an assignment of a half interest in said lease by Hodges to Daley, dated April 2, 1897, and acknowledged on April 4, 1898, and the assignment of the remaining half interest, dated April 2, 1898, and acknowledged April 4, 1898. The lease from Marshall to J. J. and J. B. Huggins was executed November 6, 1897, and recorded January 31, 1898. * * *

The question for decision is whether the proviso in the Hodges lease constituted a condition precedent, and whether the failure of Hodges to do anything towards the boring of the well did not prevent the vesting of any rights under that lease. By the terms of that instrument the lessor granted to the lessee all the oil and gas in and under the land described, "and also the said tract of land for the purpose of operating thereon for oil and gas." By a course of decisions it is well settled in West Virginia that a lease of this character is not a grant of property in the oil or in the land, but merely a grant of possession for the purpose of searching for and procuring oil. The title is inchoate, and for the purpose of exploration only until the oil is found. If it is not found, no estate vests in the lessee; and, where the sole compensation to the landlord is a share of what is produced, there is always an implied covenant for diligent search and operation. There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, or indeed any, compensation for such results. This is a matter of common knowledge, and "courts will generally take notice of whatever

ought to be generally known within the limits of their jurisdiction." Greenl. Ev. § 6. It furnished the ground upon which the plaintiff in this case asks the court, through a receiver, to bore the well which the lessee was required to bore within 90 days from the date of execution of the instrument under which he claims. The only consideration which moved the lessor to grant the lease was the prospective royalties from oil and gas, which could come only if the lessee complied with the terms of this proviso that required the boring of a well; for, while the sum of one dollar is technically a valuable, it is only a nominal, consideration. If the contention of the plaintiff is correct, the lessee, Hodges, or his assigns, could have waited the full term of five years without expending one dollar or moving a hand for the development of the leased property, meantime tying the hands of the owner of the land, forbidding him to make arrangements with any other persons for the explorations which the lessee undertook to make, and perhaps suffering irreparable injury from the drainage of his oil and gas. This is the contract which a court of equity is asked to enforce. It is a short view of the range of equitable principles. * * *

In construing this agreement in the light of all the facts surrounding contracts of this nature, and of the considerations moving the grantor in its execution, we have no difficulty in determining that the boring of a well by the grantee was the whole consideration of the lease, that nonperformance went to the entire substance of the contract, that the word "provided" is an apt word of condition, that the grantee did not, and at the time he procured the lease did not intend to, comply with the condition which was a condition precedent to the vesting of any title in the leased lands. In cases of conditions precedent, the consideration is the performance of the thing stipulated to be done, not the promise.

But it is contended by the appellee that the clause providing a forfeit of $50 for failure to bore the well within 90 days provides full compensation for failure to perform the condition. As a matter of fact, the $50 was not paid or legally tendered; but, inasmuch as the grantor had declared a purpose not to receive the forfeit money, it will be treated as if it had been tendered. The question whether a sum of money stipulated to be paid is a penalty or liquidated damages is sometimes difficult of determination, there being no criterion of universal application. It depends upon a construction of the whole instrument, the intention of the parties, the nature of the act to be performed, and the consequences which would naturally flow from its nonperformance. In many of the cases where oil leases have come before the courts, the doing of a certain thing, or the payment of rental in lieu thereof, is stipulated in the contract in a way that justifies the conclusion that the parties have provided exact and just compensation by way of liquidated damages for failure of performance in contracts, where parties stipulate in the alter-

native, and are free to choose. But where consequences likely to follow nonperformance are not measurable by any exact pecuniary standard, and the probable damage is out of all proportion to the amount agreed to be paid, this sum should be considered a penalty; and such we hold it to be in this case, where the sum of $50 is stated to be a forfeiture. It is in the nature of a security for the performance, and cannot be held to be liquidated damages for nonperformance. * * *

The governing principle in all oil leases of the character under consideration is that the discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of want of mutuality; and, where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere nudum pactum, and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done. And, the smaller the tract of land, the more imperative is the need for prompt and efficient drilling; for oil operations cumber the land, rendering it unavailable for agricultural purposes. The landowner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement.

Leaving out the proviso which bound the lessee to diligent search and development, there is nothing in this lease which bound him to do anything whatever. The proof is clear that he never intended to drill the well within the time stipulated. This proviso was written by the lessee evidently for purposes of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was "keeping the word of promise to the ear, and breaking it to the hope"; skillfully turning it into a mere speculative lease, binding the lessor and leaving himself free. It would be unconscionable to hold the lessor bound. "Law, as a science, would be unworthy of the name, if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity, on one side, and a gross violation of the principles of morals and conscience, on the other." Story, Eq. Jur. § 1316.

In Oil Co. v. Marbury, 91 U. S. 593, 23 L. Ed. 328, the facts were, to some extent, the converse of those here; but Mr. Justice Miller comments on the fluctuating character and value of this class of property, and asserts the injustice "of permitting one holding the

right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit," and referring to the distinction between real estate, whose value is fixed, says:

"The class of property here considered is subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, and requires prompt action in all who hold an option whether they will share its risks or stand clear of them, [and that] no delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably for himself whether he will abide by his bargain or rescind it is allowed in a court of equity."

In a case like this no judicial proceeding was necessary to avoid the lease. The landlord, never having been out of possession, cannot re-enter upon himself; and it was held in Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, and in many other cases, that any unequivocally expressed election to avoid, as by giving a new lease, avoids the one preceding. * * *

We are of opinion, upon the whole case, that the exploration for and development of oil and gas was the sole consideration for this lease; that the proviso requiring the boring of a well within 90 days was a condition precedent to the vesting of any interest in the lessee, and that the forfeiture of $50 was intended merely as a penalty to secure the drilling of the well, and, if paid, would have been merely compensation to the landowner for the right of the lessee to possession during the 90 days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for the period of five years; that after the expiration of 90 days from the date of the lease, there being no provision therein for any work to be done by the lessee in the development of the property, which was the sole consideration therefor, the lessor had the option to avoid it; that the inaction of the lessee during a period of 8 months, while operations were being commenced on adjoining land, calculated to drain the land of the lessor and irreparably injure him, fully justified his avoidance of the lease; and that the lease to Huggins and his associates was an unequivocal declaration of his intention to avoid it, and terminated any inchoate right which Hodges could claim thereunder. The decree of the circuit court is reversed, and the case remanded, with instructions to restore the leased premises to the appellants, and that the receiver be directed to turn over to them any moneys in his hands as the result of his operations, after deducting whatever sum may have been actually and necessarily expended by him in the development of the same, and that the bill be dismissed, with costs.

BROWN ET AL. v. FOWLER ET AL.

SAME v. OHIO OIL CO. ET AL.

1902. SUPREME COURT OF OHIO. 65 Ohio St. 507, 63 N. E. 76.

ACTIONS by one Brown and others against Catherine Fowler and others and against the Ohio Oil Company and others. The actions were heard together, and from judgments in favor of the defendants plaintiffs bring error. Affirmed.

BURKET, J.[3]—As the terms of the two leases are the same except the paragraphs as to drilling the first well, the Fowler lease will be first considered in full, and then the Minard lease in so far as the paragraph as to drilling the first well causes that lease to differ from the Fowler lease. It will be noticed by a careful examination of the Fowler lease that it has a granting clause, a habendum clause, a condition subsequent or defeasance clause, and a surrender clause. The price paid or consideration for all these clauses—that is, for the whole lease—was $1, the receipt of which is acknowledged in the lease. The instrument grants the oil and gas, and also the land for the purpose of operating thereon for said oil and gas, and it is therefore a lease, and not merely a license. Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62. The length of time for which the grant is made is not stated in the granting clause, but, as was held in Martin v. Jones, 62 Ohio St. 519, 525, 57 N. E. 238, the habendum clause makes definite the granting clause as to time. The words in the habendum clause are: "To have and to hold the same unto the lessee, his heirs and assigns, for the term of two years from the date hereof, and as long thereafter as oil or gas is found in paying quantities thereon, not exceeding in the whole the term of twenty-five years from the date hereof." This clause means that the term of the lease is limited to two years, but that if, within the two years, oil or gas shall be found, then the lease shall run as much longer thereafter as oil or gas shall be found in paying quantities; but, if no oil or gas shall be found within the two years, the lease shall, at the end of the two years, terminate, not by forfeiture, but by expiration of term; and after the expiration of said two years no further drilling can be done under the lease; and, even if oil or gas or both shall be found within the two years, the whole term of the lease must terminate at the end of twenty-five years from the date of the lease. Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266. So that by the aid given by the habendum clause to the granting clause the length of the term of the lease is settled and definitely fixed.

After the length of the term of the lease is thus definitely and

[3] The statement of facts and parts of the opinion are omitted.

certainly settled, comes the condition subsequent or defeasance clause, which says: "In case no well shall be drilled on said premises within twelve months from the date thereof, this lease shall become null and void, unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter until a well shall be drilled." This clause clearly means that the lease may be made to terminate in less time than two years—that is, at the end of twelve months—by a failure to drill a well on the premises within the twelve months, but that the lessee may prevent such termination of the lease at the end of twelve months by paying for further delay at the rate of $1 per acre at or before the end of each year thereafter until a well shall be drilled; that is, the payment must be made at or before the end of the second year of the lease, and the further delay cannot be beyond the term of two years, fixed as the lifetime of the lease. And the words "until a well shall be drilled" mean until a well shall be drilled within the two years, the term of the lease. So that this clause cannot have the effect, in any event, to extend the lease beyond the two years definitely and certainly fixed in the habendum clause. * * *

Next comes the surrender clause, in these words: "It is agreed that the lessee shall have the right at any time to surrender this lease to lessor for cancellation, after which all payments or liabilities to accrue under and by virtue of its terms shall cease and determine, and the lease become absolutely null and void." It is urged by counsel for defendants in error in both cases that this, in legal effect, makes the lessee a mere tenant at will,—his own will,—and, it being a tenancy at will as to one party it is so as to both, and that the lessor, by giving the second lease, exercised her will, and terminated the lease. It is conceded that a tenancy at the will of one party is a tenancy also at the will of the other. But this lease does not create a tenancy at will. Blackstone defines an estate at will as follows: "An estate at will is where lands and tenements are let by one man to another to have and to hold at the will of the lessor." 2 Bl. Comm. 145. This definition is adopted by 4 Kent. Comm. 110, and by writers generally, but it has been so extended as to also include estates at the will of the lessee. Doe v. Richards, 4 Ind. 374. The land under this lease was not let to have and to hold at the will of the lessor, but, on the contrary, to have and to hold for the term of two years. The term of two years is definite and certain, and cannot be disregarded in the construction of the lease, and this surrender clause cannot have the force to destroy the two-years term and make it a tenancy at will. The term of two years certain and this surrender clause are not inconsistent. Full force can be given to both. This surrender clause is an option, intended to enable the lessee to terminate the lease before the end of the term if it shall appear that there is no oil or gas in that territory. Under this clause the lessee can terminate the lease before the end of the term by surrendering the

lease, and under the defeasance clause he can do the same by failing to drill a well and failing to pay for further delay. The right to terminate the lease in either of said ways is a valuable right to the lessee, and he paid for both by paying the $1 mentioned as the consideration for the whole lease. Such options in contracts are sustained by courts. Thayer v. Allison, 109 Ill. 180; Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62. The error of construing a condition subsequent, or an option, as creating the term of the lease, when that has been created by the granting and habendum clauses, has caused many decisions to be rendered whose soundness may well be doubted. This clause gives the lessee his option, and for which he has paid, to hold the lease to the end of the term, or surrender it sooner. It is always the right of a person holding an option for which he has paid to surrender it before the expiration of the time or to hold it for the full time; but the person who gave the option cannot compel a surrender before the expiration of the full time.

It is also urged by counsel for defendants in error in both cases that the lease is void for want of mutuality. Granting that the lease was made for the purpose of operating thereon for oil and gas, and that an exclusive right to so operate was granted to the lessee, there is no want of mutuality. The lessee on his part paid $1, of which the lessor acknowledged receipt, and the lessee on his part made the demise; and because the lessor has performed his part in full, and does not promise to do anything further, it is claimed that there is no mutuality; the claim being that mutuality requires that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other. This is too narrow a definition of mutuality. One party may perform his part in full at the making of the contract, and thereafter have nothing to do or permit to be done,—having already done his part; and the other party, in consideration of what has thus been done, binds himself to do or permit to be done something in behalf of the party who has thus fully performed. A promise to perform can be no stronger than performance itself, and, where one party promises to perform his part of a contract and the other performs his part at the making of the contract, both are bound, and there is mutuality. The one who has performed is bound to permit his performance to stand, and the one who has not performed is bound to perform his part; so that both are mutually bound. Performance on part of one will sustain a promise to perform on the part of the other. Where there is no performance and no promise to perform on one side, a promise to perform on the other side is without consideration and without mutuality, and such a contract can be held void on either or both grounds. In this lease the lessee paid $1 for the lease for the exclusive right to operate for oil and gas, and thereby fully performed his side of the contract; and the lessor granted that right under the

terms and conditions of the lease, and thereby a contract was made; and the party on one side received the $1 in full, and the party on the other side received the demise, and then both were mutually bound, and both had to trust to the future for the realization of the purpose for which the lease was made. So that there is no want of mutuality, and in that respect the lease is valid.

From the findings of fact it appears that no well was drilled on the premises in the Fowler lease, and no oil produced, within two years from the date of the lease, and as the payment deposited in the bank on the 1st day of December, 1898, had only the effect to keep the lease alive until the 8th day of December, 1898, it follows that the lease terminated on that day by reason of expiration of the term of two years expressed in the lease, and that from and after the 8th day of December, 1898, the plaintiffs in error had no right to drill upon the Fowler lease, or occupy the lands under that lease for any purpose. This disposes of the controversy as to the Fowler lease, and what is said above as to the granting clause, the habendum clause, and the surrender clause in the Fowler lease is also applicable to the Minard lease, because as to those matters the two are the same. * * *

The judgments below are right, and are affirmed.

KELLY v. KEYS ET AL.

1906. SUPREME COURT OF PENNSYLVANIA. 213 Pa. 295, 62 Atl. 911.

ACTION by W. C. Kelly against A. M. Keys and others. Judgment for plaintiff, and defendants appeal. Reversed.

STEWART, J.—The defendant Keys, being the owner of a certain tract of land in Washington county, by instrument in writing, duly executed and acknowledged, granted to Kelly, the plaintiff, the exclusive right to mine and produce therefrom petroleum and natural gas, with possession of so much of the land as might be necessary for such purposes, for a term of two years, subject to certain conditions and stipulations which do not here call for recital. Kelly never exercised any rights under the grant, and never entered into possession of any part of the premises. Subsequently Keys, claiming that by reason of a default Kelly had forfeited his rights under the grant, conveyed a like right in the premises to C. D. Greenlee and the Southern Oil Company, the other defendants, who proceeded to explore the property and succeeded in producing oil therefrom in paying quantity. Kelly, averring compliance on his part with all the conditions and stipulations of the grant under which he claimed, and denying a forfeiture, brought this action of ejectment against the defendant to compel surrender of possession to himself. The action

resulted in a verdict for the plaintiff, subject to the decision of the court on a question reserved, viz., whether ejectment in such case would lie. Upon consideration, judgment was rendered upon the reserved point in favor of the plaintiff. The assignment of error that relates to the action of the court on this point is the only one that calls for present consideration.

In reaching his conclusion on the point reserved, the learned judge gave full recognition to the binding authority of Funk v. Haldeman, 53 Pa. 229, and the cases that follow it, wherein it is held that the grant of exclusive privileges to go on land for the purpose of prospecting for oil, the grantor to receive part of the oil mined, as in this case, does not vest in the grantee any estate in the land or oil, but is merely a license or grant of an incorporeal hereditament. This court has found frequent occasion to assert its continued adherence to the doctrine of these cases. Only recently, in the case of Hicks v. American Natural Gas Company, 207 Pa. 570, 57 Atl. 55, 65 L. R. A. 209, it reasserted it without qualification. Once it was determined that the subject of such a grant was an incorporeal hereditament, and not an estate in the land or oil, it logically and necessarily resulted that it would not support an action in ejectment. And this view has been steadily adhered to. In no case has ejectment been sustained under such a grant, except where possession had been acquired by the grantee and he had been wrongfully disseised. In the present case disseisin was not, and could not be, asserted. Nor could it be contended that the instrument under which Kelly claimed, though spoken of as a lease, and so denominated in the instrument itself, is in point of fact and law a lease, notwithstanding it allows possession of so much of the surface of the premises as may be necessary to conduct mining operations. This much will be implied without express stipulation; and the stipulation, being expressed, in no way distinguishes this from the cases where such an instrument is held to be merely a grant or license. The court below put no other construction on this, so long as it concerned no one but grantor or grantee; but because the defendants, holding under a subsequent lease, being in possession, had produced and were producing oil in paying quantity, he reached the conclusion that what had been the grant of an incorporeal hereditament, now that the oil had been found and was being produced, was an estate in the land, since oil was a mineral, and therefore part of the land, and that, Kelly being entitled to be put in possession of so much of the estate, ejectment could be brought for such purpose.

This line of argument overlooks the very consideration on which the authorities cited rest. In no case is it held that the grant of an exclusive right to mine for and produce oil, though it be a mineral, is a sale of the oil that may afterward be discovered. When under such a grant oil has been discovered, it is the grantee's right to produce it and sever it from the soil. So much as is thus severed be-

longs to the parties entitled under the terms of the grant, not as any part of the real estate, however, but as a chattel, and only so much as is produced and severed passes under the grant. As to oil not produced there is no change of property. It is expressly so ruled in Funk v. Haldeman, 53 Pa. 229; and the same ruling was repeated and emphasized in the case next following on the same subject. Dark v. Johnston, 55 Pa. 164, 93 Am. Dec. 732. These were the first cases in which grants of rights to explore for oil were considered and passed upon by this court. The rulings therein have been steadily and consistently followed. In this connection it is only necessary to refer to the case of Union Petroleum Company v. Bliven Petroleum Co., 72 Pa. 173, where the grant was the same as in the present case, with the additional fact that there, as here, oil had actually been discovered and was being produced, and Barnhart v. Lockwood, 152 Pa. 82, 25 Atl. 237. The reason for the rule thus established, is to be found in the peculiar character of mineral oil. This is very clearly indicated in the earlier cases, where the distinction is drawn between minerals which are fugacious in their nature, such as water, gas, and oil, and those which have a fixed situs and are necessarily part of the land; and this distinction has been allowed with controlling significance whenever oil in situ has been the subject of the dispute. Both rule and reason are against the theory that prevailed with the court below, to the effect that, the mineral once discovered, all that was in situ became in law part of the real estate.

With the rights of the appellee thus defined and limited by the cases cited above, it is manifest, without discussion, that he is in no position to maintain ejectment for the property. The question reserved was to this very point, and was raised in the first point submitted by the defendant, denying plaintiff's right to ejectment. The latter should have been affirmed. Its refusal is the subject of the eighth assignment of error, which much be sustained. It is unnecessary to consider the other assignments of error.

Judgment reversed, and judgment is directed to be entered on the point reserved in favor of defendant non obstante veredicto.

FOWLER v. DELAPLAIN.

1909. Supreme Court of Ohio. 79 Ohio St. 279, 87 N. E. 260.

Action by one Delaplain against one Fowler. Judgment for defendant was reversed in the circuit court, and he brings error. Affirmed.

The defendant in error commenced an action in the court of common pleas of Monroe county to recover possession of certain real property situate in that county, and for damages for the unlawful

detention of the same. On the trial a verdict was returned in favor of the plaintiff in error, and judgment was rendered on the verdict. A petition in error having been filed in the circuit court, the said court reversed the judgment of the court of common pleas, for the reason that the court erred in admitting testimony on the part of the defendant below over the objection of the plaintiff below. This proceeding is prosecuted to reverse the judgment of the circuit court, and to obtain an affirmance of the judgment of the court of common pleas.

DAVIS, J.[4]—* * * However, we think that the circuit court [which reversed the judgment for error in the admission of evidence] might safely have gone much farther. One of the assignments of error in that court was that the court of common pleas erred in overruling the demurrer to the second and third defenses of the defendant's answer. The defendant's second defense met the assertion of the plaintiff's claim of title and right to possession by alleging that the plaintiff acquired title by devise, and subject to all the burdens which existed on the property at the death of the testator, and that the defendant was placed in possession of the premises in controversy by the testator, who was also the lessor in the oil lease, under an oral contract that defendant should have and hold possession of the premises so long as he was engaged as an employé of the parties who owned the leasehold, and was operating the same for oil and gas, and that the defendant was in possession thereof at the time the plaintiff became seized, and that under this oral agreement, and with knowledge on part of the plaintiff's testator, the defendant erected, and has occupied until now, as an employé of the owners of the leasehold, the buildings on the premises in controversy in this action. The substance and effect of this defense is that the defendant claims to be in lawful possession of the disputed premises under a parol license from the owner to himself, and not under the oil lease, which was granted to his employers. That which he alleges as a contract is merely a permission, without consideration, to occupy and use the premises for an indefinite time, and without the grant of a permanent interest in the land of any kind whatever. It was neither a lease nor an easement, but was merely an oral license to occupy for a temporary purpose. Being a license not coupled with an interest in the land, it is revocable at any time. As such, it was probably revoked by the licensor when he devised the property to the plaintiff below, the defendant having no interest in the land, and certainly it was revoked by the death of the licensor, because, not being an interest running with the land, the permissive right expired with him who gave it (see 25 Cyc. 651, note, 61); and it was

[4] The statement of facts is abbreviated and parts of the opinion are omitted.

again revoked by the plaintiff below, the admitted owner of the legal title to the premises.

In some of the states, and heretofore to some extent in this state, equity will not allow an executed license to be revoked. This is upon the ground that a revocation would operate as a surprise and fraud upon the licensee. Probably this rule has never been applied unless the license was connected with an attempted grant of an interest in real estate. But even in jurisdictions where it prevails to its fullest extent, it has been held that a mere naked acquiescence, such as is alleged in this case, in the construction of valuable improvements, or the expenditure of money, on the faith of the license, will not render it irrevocable. Ewing v. Rhea, 37 Or. 583, 62 Pac. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783; Kipp & Kendall v. Coenen & Bechtell, 55 Iowa, 63, 7 N. W. 417. And see Wilkins v. Irvine, 33 Ohio St. 138. In the license which we are now considering the licensor did not undertake to do anything, nor to grant any interest in the land, permanent or otherwise. The licensee took the premises by mere sufferance, and took possession with the possibility that the license might be revoked at any time; and any expenditures or improvements which he may have made under such conditions he made for his own convenience, and at his own risk. It scarcely needs to be mentioned that if this were an unquestionable case of an executed license, it would come within the recent ruling of this court in Yeager et al. v. Tuning et al., 86 N. E. 657. * * *

The judgment of the circuit court reversing the judgment of the court of common pleas is affirmed. The cause will be remanded to the court of common pleas, with instructions to sustain the demurrer to the second and third defenses of the answer, and for such other proceedings in accord with this opinion as are authorized by law.

Judgment accordingly.

BARNSDALL v. BRADFORD GAS CO.

1909. Supreme Court of Pennsylvania.
225 Pa. 338, 74 Atl. 207.

Action by William Barnsdall, Jr., against the Bradford Gas Company. Judgment for defendant non obstante veredicto, and plaintiff appeals. Reversed.

Argued before Brown, Mestrezat, Potter, Elkin, and Stewart, JJ.

Mestrezat, J.[5]—We think the learned court below was in error in setting aside the verdict and entering judgment non obstante

[5] Parts of the opinion are omitted.

veredicto for the defendant. The præcipe and writ show this case to be ejectment for the recovery of 100 acres of land in Hebron township, Potter county. The parties claim through a common source of title. The plaintiff's title rests upon what is known as a gas and oil lease, dated November 8, 1906. * * *

Whether an agreement, commonly known as an "oil and gas lease," creates an estate or interest in land, or is a mere license to enter and operate for those minerals, has frequently been before this court, as the numerous reported decisions attest. An examination of the cases will disclose that they have drawn a clearly defined distinction between agreements which create a lease of the land for mineral purposes and those which are simply a license giving to the licensee authority to enter and operate for minerals. While this distinction has not been strictly adhered to in all the cases, yet it is recognized and has been established in the leading cases on the subject in this state, and is sustained by text-writers. It is well stated in 27 Cyc. 690, where it is said: "There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as personal property, and his possession is the possession of the owner. A contract simply giving a right to take ore from a mine, no interest or estate being granted, confers a mere license, and the licensee acquires no right to the ore until he separates it from the freehold. But an instrument that demises and leases certain lands for mining purposes only, for a designated term of years, at a fixed rent, and giving the right to erect all necessary buildings, etc., is a lease, and not merely a mining license."

The language of the agreement in the case at bar shows it to be a lease, conveying an interest in land, a corporeal and not an incorporeal hereditament. The lessor does, in the language of the lease, "grant, demise, lease and let unto the said party of the second part * * * all that certain tract of land * * * containing one hundred acres, * * * for the sole and only purpose of mining and operating for oil, gas and other minerals and of laying pipe lines and of building tanks, stations and structures thereon to take care of the said products." It will thus be seen, by this transposition of the language of the lease, that the land itself is granted and demised, and not simply the right to enter upon and prospect and operate for oil or gas. It is not simply a privilege given to the lessee to use the premises for mining purposes, but the land itself is demised with the right to obtain the minerals therein. By the agreement the exclusive right to take and appropriate all the minerals is conveyed, and during the term of the lease the lessor has no right to enter and operate for oil or gas. The title to the oil except the one-eighth

thereof is vested in the lessee, as is also the title to the gas and other minerals in the land. Under the rule of construction established, not only in other jurisdictions, but by our own cases, therefore, the agreement creates a corporeal interest in the lessee in the demised premises, and is not merely a license to enter and operate for oil and gas. In Chicago & Allegheny Oil & Mining Company v. United States Petroleum Company, 57 Pa. 83, the lease contained this language: "The party of the first part hereby covenants and agrees to lease to the party of the second part, his heirs and assigns, all his right, title, interest and claim in and to all that certain piece or parcel of land, * * * the said party of the second part to have the sole and exclusive right to bore or dig for oil on said lands and gather and collect the same therefrom, for the term of twenty years from the date hereof." Mr. Justice Agnew, in the opinion of the court, speaking of the character of the agreement, says (page 90): "The agreement * * * is manifestly a lease for years of a corporeal tenement with an added exclusive right to bore for, obtain, and take the oil found, returning as rent one-fourth of the product to the lessor." In Titusville Novelty Iron Works' Appeal, 77 Pa. 103, Mr. Justice Gordon delivering the opinion and speaking of a leasehold on which were a house and an oil well, said (page 107): "A lease of land during the term is as fixed as the land itself, for it can only be used upon the land out of which it arises. It is nothing more or less than a right to use a freehold for the term mentioned in the lease. It is therefore an estate in land." In Kitchen v. Smith, 101 Pa. 452, the land was leased for 15 years "for all purposes necessary to develop the same by procuring oil and taking it therefrom, together with a right to put up and keep tanks thereon for its storage." As to the estate created by the lease, Mr. Justice Trunkey, delivering the opinion, says (page 457): "The lease vested in the lessees and their assigns the exclusive possession of the land for the purpose of searching for, producing, storing, and transporting oil. They had the right to possession of so much of the land as was necessary for said purpose, and were in the actual possession of a considerable part, if not the whole. Their right was not a mere license." In Duke v. Hague, 107 Pa. 57, the contract granted and leased "the exclusive right for the sole and only purpose of mining and excavating for petroleum, rock or carbon oil, all that certain tract of land, * * * to have and to hold the said premises exclusively for the said purpose only, unto the said party of the second part, * * * for and during the full term of twenty years." The trial court held that the lease created an interest in the land. Mr. Justice Trunkey in affirming the judgment said (page 66): "The purpose of the lease is first named; but that the land is leased for that purpose is as plain as if a description of the land preceded the clause restricting its use. * * * A portion of the oil that may be produced is reserved as rent or royalty. Failure of the lessee to

perform his covenants will avoid the lease. Notwithstanding these stipulations, the lessee is vested with an interest in the land. His interest is that of a tenant for years for the purpose of mining. He has an absolute right of possession of all the surface necessary, and no one else can rightfully take out oil during the term, save under him. The whole of the oil, or only a part, may be taken under the lease; but whatever shall be taken is of the substance of the realty. He is not an absolute owner of the whole of the oil, as he would be were all the oil in place conveyed to him in fee." In Brown v. Beecher, 120 Pa. 590, 603, 15 Atl. 608, 609, the land itself was demised "with the sole and exclusive right and privilege, during said period, of digging and boring for oil and other minerals and collecting the same therefrom." Mr. Justice Clark in delivering the opinion said: "As to the legal force and effect of this right there can, we think, be no doubt. It conveyed an interest in the land. In this respect it is distinguished from a license." Many other cases to the same effect might be cited; but these are sufficient to show that the agreement between the plaintiff and his lessor was a lease, conveying an interest in the land, and was not a license to enter upon the land and operate for mining purposes. In the last case cited, the decisions referred to above are distinguished from Funk v. Haldeman, 53 Pa. 229, and kindred cases by Mr. Justice Clark in the following language (page 603 of 120 Pa., page 608 of 15 Atl.): "The contract of February 3, 1882, between Cornon and Marsh, is not a mere license, as in Funk v. Haldeman, 53 Pa. 229, for in that case the words of the grant amounted neither to a lease nor a sale of the land, nor of any of the minerals in the land. Funk's right was therefore declared to be a license to work the land for minerals, a license coupled with an interest which the licensor could revoke."

The defendant contends that, conceding the contract in question to be a lease and not a license, the plaintiff cannot maintain ejectment, as he had not entered into possession of the premises. We are aware of the rule at common law which in the case of an ordinary lease requires the lessee to have been in possession of the premises before he can maintain ejectment against any one who had ousted him. That is the rule recognized and followed in this state where real property is demised for the purpose of occupancy and use by the tenant; but we are not disposed to enforce it in cases like the present, where by the contract the lessee is granted the possession of the land with the sole and exclusive right to mine and remove the minerals therein. In such case, while the tenant is regarded as a lessee, yet by agreement he obtains title to the minerals and the right to the possession of the premises for removing them. As said in Duke v. Hague, 107 Pa. 57, the tenant has an absolute right of possession of all the surface necessary to enable him to drill and remove the oil, and no one else can rightly take out oil during the term, save

under him. The contract gives him the right to the oil and to the possession of the land to enable him to remove it. As also said in the Duke Case, the whole of the oil, or only a part, may be taken under the lease; but whatever shall be taken is of the substance of the realty. Having acquired by the contract a right to a part of the realty, the law should give the lessee an adequate remedy to enforce that right. Ejectment is the proper action for the recovery of possession of land in this state. It is a possessory action, and, if a party has a right to possession and the immediate right to enter, he may maintain ejectment. Here the lessee has the right to the possession of the premises, the immediate right to enter, and the right to take the oil therefrom which is a part of the realty. It will be observed that the lessee has not simply the right to the possession of the premises, but also the title to the oil, or such part thereof as he may be able to remove during his tenancy. * * *

This is not a contest between the lessor and the lessee for the possession of the premises. The lessor concedes to the lessee the right to the oil and to the possession of the premises for the purpose of removing it. This action is by the lessee against a third party who claims adversely to the lessor, and we think he can maintain ejectment, which is the only action that will afford him an adequate remedy for his alleged injuries. * * *

The judgment is reversed, and the court below is directed to enter judgment on the verdict.

GRACIOSA OIL CO. v. SANTA BARBARA COUNTY.

1909. Supreme Court of California. 155 Cal. 140, 99 Pac. 483.

Action by the Graciosa Oil Company against the County of Santa Barbara. Judgment for plaintiff, and defendant appeals. Reversed.

Shaw, J.—This is an action to recover taxes assessed against plaintiff by defendant and paid under protest, claiming that the assessment is void.

For the year 1904 plaintiff was assessed for taxes as the owner of property described on the assessment roll as "Mining rights and privileges under lease made by L. Harris et al., to Graciosa Oil Co. dated December 15, 1900, and recorded in [referring to the record] in and to the following described lands [describing about 7,000 acres of land situated in Santa Barbara county]." The property rights thus described were assessed at the value of $14,950, and on this assessment the taxes in question were levied and paid. For the same year the same land was assessed to the lessors Harris et al., who were the owners of the fee, at the value of $66,150. In this assessment the land was described by sections and subdivisions, precisely as in the

assessment to plaintiff, wthout mention of any deduction from the valuation thereof or of any exception arising out of any qualification, limitation, or burden upon the fee, by reason of the separate ownership of the mining rights and privileges referred to in the assessment to plaintiff. It was found by the court, however, "that the mining rights and privileges assessed to plaintiff was not included, and no part of them was included, for assessment in or with any of the property as assessed to" Harris et al., and that "the said assessment of said mining rights and privileges was not included in and did not include the assessment of any property assessed" to said Harris et al. We understand this finding to mean that there was no double assessment or double taxation upon the same property or interest therein, and we assume therefrom that the valuation of the entire estate and property in the land, as made by the assessor, including the plaintiff's rights and privileges, would exactly equal the aggregate amount of all the assessments involved. The court below in its conclusions of law held the assessment to plaintiff void solely on the ground that the mining rights and privileges granted by the lease were not taxable or assessable separately from the land upon which they were operated, and that the lease did not create a separate taxable interest in the land, or justify a separate assessment of the right granted, although the value of said right was not included in the valuation of the land in the assessment to the landowners. The question presented and argued is whether or not, under the provisions of the Constitution and of the Political Code providing for taxation, an assessment of the mining rights and privileges of plaintiff under the lease referred to can be made against the plaintiff, separately from, and in addition to, the assessment to the owners of the fee covering the land itself but not including said rights and privileges, or, in other words, whether or not the respective rights of the plaintiff and of Harris et al., under the contract, are separately assessable to each.

The contract of lease was dated December 15, 1900. The parties of the first part, named as lessors, were Lawrence Harris, Eleanor Kate Harris, and Harry H. Harris, the owners of the land. By this contract the land owners granted to the plaintiff, party of the second part, "the sole and exclusive right to enter upon the premises (described) for the purpose and to mine or bore wells, or to do whatever things may be necessary and proper for the development and extraction upon said premises of petroleum, and other hydro-carbon substances, by whatever name known and natural gas (asphaltum included)," together with the privilege of conveying over said land any of said substances produced therefrom, the right to use the water of the streams thereon so far as needed in said business, and of placing and maintaining on the premises "all structures and appliances necessary and useful for the objects of the lease; * * * to have and to hold the said premises and privileges

with the appurtenances for the said purposes unto the said party of the second part, its successors or assigns, from and after the date hereof * * * for and during the whole period of twenty years, unless otherwise terminated by the party of the second part [plaintiff?], for failure to comply with the terms of this lease," provided that, if any wells on the premises were then producing oil, such wells might be retained by the plaintiff and deepened and operated thereafter so long as they continued to produce. It further provided that the lessee should begin development work within six months from the date of the lease and prosecute the same continuously in good faith to success or abandonment, but that it should have the right at its option to abandon the lease at any time that it deemed it unprofitable to hold or operate and that the lease should thereupon become void. And further that, "in the event that oil is found, the lessee agrees to deliver or pay as rent or royalty to the said lessor * * * the one-tenth part or share of so much of all the crude oil of petroleum, naptha, or maltha which may be produced and saved by the lessor from said wells and operations on said premises," not including that required by the plaintiff for fuel in the mining operatons.

The contention of the respondent is that there can be but one assessment of these lands, that the assessment to the Harrises covers and includes all other interests, and that, after having made that assessment, excluding the value of plaintiff's rights, it is not lawful to separately assess to the plaintiff the value of its property rights under the oil lease. It is no doubt the general rule, regarding land held under an ordinary lease for years giving the right to hold the land for usufructuary purposes only, that, in the absence of contrary statutory provisions, there is to be but one assessment of the entire estate in the land, and that this assessment should include the value of both the estate for years and of the remainder or reversion. 27 Am. & Eng. Ency. of Law, 678; Chicago v. People, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69; State v. Mississippi B. Co., 109 Mo. 253, 19 S. W. 421. Section 3887 of the Political Code recognized this rule, and provided that "the mortgagor or lessor of real estate is liable for the taxes thereon." This section was repealed in 1880, but, so far as we are advised, the practice of making but one assessment of such land and covering therein the entire value of all interests and estates has been uniformly followed in this state, since its repeal as well as before. With respect to ordinary leases for usufructuary purposes there are good reasons for this practice. Except when held for speculative purposes, the value of land usually depends on the value of the use and occupation, and consists of a sum equivalent to a principal which, at the rate of interest usual upon safe investments, will bring a net annual income equal to that which the land will produce. The lessor or landowner annually

receives a sum as rent which he deems the equivalent of this annual income, or of the value of the use of the land to him, and therefore he enjoys the entire beneficial interest in the premises, including the value of the leasehold as well as of the fee. There are exceptional cases, due to the sudden rise in rental values, where this is not the case. But general rules in regard to taxation must be made to fit the usual conditions and not the exceptional ones, and statutes are to be construed with this fact in view. Since 1880 there has been no express statutory provision on the subject, but we think that, as to such leasehold estates, the owner of the fee may fairly be deemed to be the owner of the whole estate for purposes of taxation.

There are material differences between such estates for years and the right and privilege to bore for and extract oil held by the plaintiff under its oil lease. See Thornton on Oil, §§ 47, 48. The plaintiff, it is true, does not own an absolute present title to the oil strata in place. Such an absolute estate in an underlying stratum may be created and the estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of respective owners of two adjoining tracts of land. For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically. Jones on Real Prop. § 537; State v. Moore, 12 Cal. 70. But the contract in question vests no present title in a stratum in place. It leaves the title to the oil in the landowner until it is brought to the surface. The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and a chattel real at common law. Civ. Code, § 801, subd. 5; section 802, subd. 6; Harvey C. & C. Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928-937, and cases there cited; Thornton on Oil Leases, § 51. The royalty is frequently fixed before the discovery of oil, usually at a time when the existence of oil in profitable quantities is a matter of conjecture, and without regard to the adjustment between the parties of the burden of taxation upon the respective interests. The value represented by the royalty is ordinarily very small, as compared to that of the right of the lessee. After the discovery of oil in such leased ground, the value of the lessor's real interest and right is much less than it would be if he had the whole estate, including all the oil thus discovered. There is no real parallel between such a case and that of a lessor under an ordinary lease for occupation and use. It is well known that such leasehold estates or interests in oil strata, after a discovery of oil, often command large prices in the market, out of all proportion to the value of the interest of the landowner receiving only the royalty and enjoying the use only for other purposes. The right of the lessee under this contract is more than

that of the ordinary lessee. It is of a different character and for a different purpose. He has no right at all to the usufruct of the soil. His right extends to the extraction of a certain part of the substance of the land itself, to its permanent separation and removal and its conversion to his own use. The whole object of the contract is to effect, if not technically a sale and conveyance of a substantial and specific part of the land, at least a disposition and transfer thereof to another. It can be easily seen that the reasons for the rule applicable to ordinary leases for the use only that the entire estate should be assessed to the lessor are entirely lacking here, and that it would be a more just and reasonable adjustment of the burden of taxation of such oil leases to assess each party separately with the value of his right or estate in the land. There is no statute forbidding it. On the contrary, we think the statute at least permits it, if it does not require it. If it is permitted, the respondent cannot complain. The suit is based on the provisions of section 3804 of the Political Code which give a right of recovery only when the assessment is absolutely void. Mere irregularities in procedure which do not invalidate the assessment do not absolve the taxpayer from his obligation to pay the taxes nor give him any right to recover taxes already paid.

The Political Code declares that all property must be assessed to the owner thereof. Section 3628. It must be conceded that the rights and privileges of the plaintiff under this lease are private property and are taxable in some form. Const. art. 13, § 1. The property rights thus vested in plaintiff belonging to it, and not to its lessor. It cannot with good reason be contended that the value of the lessor's estate, including the value of the right to the royalty in the oil produced, embraces, covers or represents the value of the plaintiff's rights and privileges in the land, as in the case of the lessor in an ordinary lease. It would seem to follow necessarily that the mining rights and privileges of the plaintiff should be separately assessed to it as the owner. The Code recognizes such rights and privileges as a species of property in real estate, and makes sufficient provision for the effective enforcement of payment of taxes thereon. Section 3617 provides as follows: "The term 'real estate' includes: (1) The possession of, claim to, ownership of, or right to the possession of land. (2) All mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations, growing or being on the lands of the United States, and all rights and privileges appertaining thereto." The strata of oil or oil-bearing sand constitute, as we have seen, a part of the land which may be the subject of separate ownership. There may be a separate "claim to" this part of the land, as well as a separate "claim to" a portion of the surface. A "claim to" take this stratum from its place and then convert it to one's own use may well be termed a claim to land, although not accompanied by actual physical possession of the sub-

terranean deposit. The lease also gives plaintiff the right to possession of the surface of the ground, so far as may be necessary to enable it to bore for and extract oil and as an incident to the main purpose of the contract. The plaintiff's rights may therefore in these aspects be classed as real estate within the first clause of section 3617. The oil strata also constitute "minerals in and under the land," and the rights and privileges of plaintiff under the lease are clearly "rights and privileges appertaining" to such minerals, and consequently are real estate within the meaning of the second subdivision aforesaid. With respect to enforcing payment of the taxes, section 3820 provides that "the taxes on all assessments of possession of, claim to, or right to the possession of land, shall be immediately due and payable upon assessment, and shall be collected by the assessor as provided in this chapter." Section 3821 declares that in the cases provided for in section 3820 the assessor shall at the time of making the assessment, or at any time before the first Monday of August following, collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed, or if no personal property can be found, then the assessor may collect the taxes by seizure and sale of the right to the possession of, claim to, or right to the possession of, the land. By section 3822 the provisions of sections 3791 to 3796, inclusive, are made applicable to such seizure and sale. These sections provide for a sale at public auction with immediate delivery of possession to the purchaser. The interests of plaintiff, therefore, come within the precise terms of section 3820, and, if no personal property can be found belonging to the owner, the assessor could forthwith proceed to sell the rights of the plaintiff in the land and in the oil strata and give immediate possession thereof to the purchaser. Such being the reasonable construction of the statute, it is to be presumed that it was intended to have that effect by the Legislature. In Bakersfield, etc., Co. v. Kern Co., 144 Cal. 154, 77 Pac. 892, it was held that taxes on a mining claim were collectible immediately under these sections. There is a statement in the opinion in that case that payment of taxes could not be enforced by a sale of the mining claim. But, in the view of the facts there involved and stated, this evidently means no more than that such sale could not be made as there threatened; that is, without previous search for personal property and a seizure and sale thereof if found.

It may be urged that the second clause of section 3617, above quoted, refers only to mines, minerals, quarries and timber "growing or being on lands of the United States," and to rights and privileges in such lands only, and has no application at all to lands held in private ownership. We can perceive no necessity for so narrow a construction. It is a matter of common knowledge, and a thing recognized by legislative enactments, that such mining rights and privileges may exist on lands belonging to the state of California.

St. 1897, p. 438, c. 270, § 3; St. 1880, p. 130, c. 117; St. 1873—4, p. 766, c. 531. The lands of the state are not taxable. If the rights and privileges of the miner upon such lands are not taxable to the person in possession, they would entirely escape taxation. There is no doubt that the section does include such private possessory interests and rights in lands of the United States and authorizes the assessment thereof as private property, but it may also reasonably be held to include mines, minerals, and quarries in and under state lands and lands held in private ownership, and rights and privileges appertaining thereto, and to authorize the separate assessment of such property, when held separately from the ownership of the other parts of the land, the first part of the clause referring to absolute titles to such minerals, and the latter part to mining rights and privileges, such as those of the plaintiff in this case. In view of the manifest propriety and justice of such separate assessments, a broader construction should be adopted.

The court below erred in holding that the mining rights and privileges of the plaintiff under the lease could not be lawfully taxed to plaintiff separately from the interest or estate assessed to the landowners. Upon the findings made judgment should have been given for the defendant.

The judgment is reversed.

MOUND CITY BRICK & GAS CO. v. GOODSPEED GAS & OIL CO.

1910. Supreme Court of Kansas. 83 Kan. 136, 109 Pac. 1002.

Action brought by the Mound City Gas, Coal & Oil Company, which had obtained an oil, coal, and gas lease upon a tract of land of which Henry Carbon was the owner, against the Goodspeed Gas & Oil Company, which claimed a subsequent lease on the same premises.

The court on motion of the defendant gave judgment on the pleadings in favor of the Goodspeed Gas & Oil Company, and the Mound City Brick & Gas Company appeals. Affirmed.

Johnston, C. J.[6]—The only question presented for consideration is whether the failure of appellant to have the lease in question recorded within 90 days after its execution and to have the property listed for taxation renders the lease null and void. The trial court, it is stated, held that the lease was void for noncompliance with chapter 244 of the Laws of 1897 (Gen. St. 1909, § 9334). It reads:

"That where the fee to the surface of any tract, parcel or lot of

[6] The statement of facts is omitted.

land is in any person or persons, natural or artificial, and the right or title to any minerals therein is in another or in others, the right to such minerals shall be valued and listed separately from the fee of said land, in separate entries and descriptions, and such land itself and said right to the minerals therein shall be separately taxed to the owners thereof respectively. The register of deeds shall furnish to the county clerk, who shall furnish on the first day of March each year to each assessor where such mineral reserves exist and are a matter of record, a certified description of all such reserves: Provided, that when such reserves or leases are not recorded within ninety days after execution, they shall become void if not listed for taxation."

This provision has been interpreted and its validity upheld. Mining Co. v. Crawford County, 71 Kan. 276, 80 Pac. 601; Gas Co. v. Neosho County, 75 Kan. 335, 89 Pac. 750. It is argued that the act was only intended to apply to solid minerals, such as coal, lead, and zinc, and that because of their peculiar attributes oil and gas are not capable of ownership in place and cannot have been within the legislative purpose. The terms of the act are broad enough to embrace minerals of every kind, and it is well settled that oil and gas, although fugitive fluids, are minerals. Zinc Co. v. Freeman, 69 Kan. 691, 76 Pac. 1130; Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740.

It has also been determined that, although oil and gas in place are a part of the realty, the stratum in which they are found is capable of severance, and by an appropriate writing the owner of the land may transfer the stratum containing oil and gas to another. Such party acquired an estate in and title to the stratum of oil and gas, and thereafter it becomes the subject of taxation, incumbrance, or conveyance. Kurt v. Lanyon, 72 Kan. 60, 82 Pac. 459; Moore v. Griffin, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477; Barrett v. Coal Co., 70 Kan. 649, 79 Pac. 150; Chartiers' Block Coal Co. v. Mellon, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645.

It being competent for an owner of land by contract or conveyance to sever an underlying layer or stratum of oil or gas from other parts of the land, and thus vest the title of the layer in another, there remains the question whether the writing executed by Henry Carbon is sufficient to accomplish a severance of the mineral from the remainder of the land. The ordinary agreement giving the lessee the right to enter and explore for oil and gas and to sever and own any that may be found, paying a royalty to the owner of the land, is a license, which does not operate as a severance of the minerals. In Gas Co. v. Neosho County, supra, the act providing for taxing separate mineral interests in lands was considered, and it was there pointed out that a lease of the type just mentioned grants no estate, gives no title, does not operate to sever the oil and gas from the

land, and is therefore not separately taxable to the lessee. On the other hand, attention is called to another class of writings which do transfer an estate in the mineral and operate to sever the ownership of the oil and gas from the ownership of the surface. It will be observed that the lease in question gives more than a license, more than an incorporated hereditament. It "grants, conveys and warrants unto Robert Fleming, second party, his heirs, successors and assigns, all the oil, coal and gas in and under the following described premises." In connection with the grant, the right is given to enter and use the surface so far as may be necessary for the second party to avail himself of the use and benefit of the part conveyed. The consideration was a certain quantity of the coal and oil produced and a certain amount annually for each gas well used, together with gas sufficient to supply the residence of the grantor. In another paragraph of the instrument provision is made for the reconveyance of the premises by the second party; it being stipulated that if no well is drilled within 10 years he shall reconvey the property to the first party, and when this is done the instrument first made shall be null and void. There is also a provision that the first party reserves to himself oil and gas for his own use on the premises for domestic purposes.

The language of the instrument is manifestly that of a grant and not of a license. It purports to convey all of the coal, oil, and gas underneath the tract of land, instead of a privilege or license to prospect for and to sever and own so much of it as the lessee might find. It transfers at once and makes him the owner of the minerals under this tract of land—a very different thing from giving him the right to prospect and to own only that which he finds and brings to the surface. The character of the instrument is indicated to some extent by the fact that the grant, together with the accompanying rights and privileges, were extended to the heirs, successors, and assigns of the grantee. Then there is the reservation of oil and gas for domestic purposes, by which the grantor proceeds on the theory that he is taking back something out of that which was granted and which would have passed to the grantee but for the reservation. The name by which the writing is designated is not a matter of great consequence, as what is called a "lease" may as effectually transfer the minerals underneath a tract of land as a more formal instrument of conveyance. A severance, such as the statute in question contemplates, may be made by an exception or reservation in a deed, or by an express grant in any other instrument. In Sanderson v. Scranton, 105 Pa. 469, where there was an agreement by an owner leasing all of the coal under the surface of land and providing that a certain quantity should be mined by the lessee each year, that monthly payments should be made by the lessee in proportion to the quantity mined, and extending the rights and privileges conferred by the lease to the heirs, executors, administrators, and assigns, it was held

"that this agreement was not merely a license or lease to mine coal to become the lessee's when mined, but it operated as such a severance of the surface and subjacent strata, and a sale or assignment of the coal in place, as would relieve the owner of the surface from responsibility for taxes levied upon the coal." See, also, Peterson v. Hall, 57 W. Va. 535, 50 S. E. 603.

We see no difference in applying the act to the cases such as this, where the underlying strata of land have become vested in different owners. Counsel for appellant says the lease or reserve must be taxed, if at all, as personal property, and suggest difficulties in determining the situs of such property. It is the interests or estates severed and created which are to be taxed, and not the instrument creating the separate interests. In Gas Co. v. Neosho County, supra, it was demonstrated that the mineral rights carved out, and which were to be subject to taxation, were to be treated as realty, and not as personal property. It was said: "It is contemplated that there shall be an estate consisting of what is left after the mineral rights have been carved out, and that there shall be an estate consisting of the mineral rights which have been segregated. The statute further contemplates that each state must vest in a separate person. The respective proprietors are called 'owners,' and the estate in the mineral is nothing short of the right or title to the minerals themselves as they lie in the ground." In Mining Co. v. Crawford County, supra, it was suggested that there would be difficulty in enforcing the act and in the assessment of such segregated property; but the suggestion was met by saying that the value of such property might be ascertained and the assessment made under the general rules governing the assessment of real property. As it is the interest in the land, and not the instrument, which transfers the interest that is taxed, the indefiniteness which counsel see in the act largely disappears. The lease does not become void by the mere failure to record it, but only when there is the additional delinquency of omitting to list it for taxation. If it is recorded as the statute enjoins, the taxing officer has an opportunity to find and assess the property conveyed by it, and if the owners omit to record the lease, and further omit to list it, and thus bring it to the attention of the taxing officials within the time fixed for listing property, the lease then becomes void and may be so declared by the court at the instance of any interested party.

As the owner of the interest in question failed to record the lease within the prescribed time, and also failed to list the property for taxation, the lease was a nullity, and the judgment of the trial court deciding that it was void will be affirmed. All the Justices concurring.

Section 2.—Covenants and Conditions in Oil and Gas Leases.

HEADLEY v. HOOPENGARNER et al.

1906. Supreme Court of Appeals of West Virginia.
60 W. Va. 626, 55 S. E. 744.

Bill by Mansfield Headley against H. L. Hoopengarner and others. Decree for plaintiff, and defendant the Colonial Oil Company and others appeal. Reversed and remanded.

Sanders, J.[7]—This is a suit in equity, brought in the circuit court of Tyler county by Mansfield Headley against H. L. Hoopengarner and others. Upon a final hearing the court below decreed for the plaintiff, and from this decree an appeal has been allowed. * * *

It is contended by plaintiff's counsel that there is no implied covenant of warranty in an oil and gas lease. This is based upon the theory that the lease from the Headley heirs to Hoopengarner, Wharton, and Karnes & Co. was a sale of the oil in place, and passed a fee-simple estate, and not merely a lease or rental contract. If this claim were correct, and had it been a grant of the oil in place, creating an estate in fee, then the authorities unanimously hold that there is no implied covenant of warranty, but that such covenant must be expressed in the deed; but, also, on the other hand, if the title passes an estate for years, with a reversion to the lessor, then there need be no express warranty of title or for peaceable and quiet enjoyment of the demised premises, but such covenant is implied in law. Where the lease contains such language as the one we have here, which says, "have granted, demised, leased, and let, and by these presents does demise, grant, lease, and let, unto the party of the second part," it is universally held that there is an implied covenant of title for quiet and peaceable enjoyment for the purposes of the lease, when there is no statute restricting or qualifying the meaning of such words. This is not an open question in this state. In the case of Knotts et al. v. McGregor, 47 W. Va. 566, 35 S. E. 899, this is held to be the law, wherein it is said: "In a lease for oil and gas, there is an implied covenant of right of entry and quiet enjoyment for the purposes of the lease." "With respect to estates less than freehold, covenants for title were from the earliest times implied, not only from the words of leasing, 'such as "demisi," "concessi," or the like,' but even from the relation of landlord and tenant; and such is the law at the present day, unless where, as in some of the United States, it has been altered by legislation." Rawle on Covenants (5th Ed.) § 272. * * *

Now, then, we find that in a conveyance of an estate less than a

[7] Parts of the opinion are omitted.

fee, as for a term of years, that a covenant of warranty of title and for quiet and peaceable enjoyment is implied.

Then the question is, does the lease convey a fee-simple estate, or an estate for years? This is the ordinary oil and gas lease, with a reversion to the grantors, for the purpose of mining and operating for oil and gas, laying pipe lines, building tanks, stations, and structures thereon, and, in consideration thereof, to pay as royalty a one-eighth part of all the oil produced and saved from the leased premises. While we have some cases which may be construed to hold that the ordinary oil lease, investing the lessee with the right to remove all the oil in place in the premises in consideration of a certain stipulated royalty, is, in legal effect, a sale of a portion of the land, yet these cases do not conform to many others, which treat such contracts only as leases, and a conveyance for a term of years, and not to pass an estate in fee. We do not think the lease in question can be so construed as to be other than a contract which passes only an estate for years. "A lease is a contract for the possession and profits of lands and tenements on the one side, and the recompense or rents on the other, or, in other words, a conveyance to a person for life, years, or at will, in consideration of a rent or other recompense." 18 Am. & Eng. Ency. Law (2d Ed.) 597. And a lease is defined to be, by Blackstone, properly a conveyance of lands or tenements in consideration of rent or other recompense, made for life, for years, or at will, but always for a less time than the lessor hath in the premises, because, if it be for the whole interest, it is more properly an assignment than a lease. In fact, there is no difficulty in determining the requisites of a lease. There is no difference of opinion as to that. The definitions are uniform, but the difficulty is in always determining whether or not the particular paper or contract falls within the definition. Applying the definition to the contract here, and we find that it falls clearly within the true meaning of the word lease. It conveyed an estate less than the lessor had in the premises; it was to remain in force for the term of three years from its date, and as long thereafter as oil or gas, or either of them, was produced from the premises by the lessees; it contained the usual words essential to its operation, which are, "grant, lease and let"; it gives to the lessees the right to the possession of the lands for oil and gas operations, with the profits derived therefrom; and, on the other hand, the lessor is to be recompensed by his receiving a certain part of the production as royalty. It cannot be said that the provision in the lease, which says that it shall remain in force as long after three years as oil and gas, or either, is produced by the lessee, can be so construed as to detract from it the essentials of a lease, and make it such a conveyance as to pass the whole estate to the lessor. This is an optional provision, and there is a clause in the lease reserving unto the lessees the right to surrender the lease for cancellation at any time. Therefore Thomas

J. Headley, the father of Mansfield Headley, having in his lifetime conveyed to the South Penn Oil Company and to Loomis a one-half of the oil and gas underlying the 46 and 24 acres, respectively, and which should be construed to be one-half of the prevailing one-eighth royalty, and Mansfield Headley having leased to Hoopengarner, Wharton, and Karnes & Co., the remote assignors of the defendants, his interest in the seven-eighths of the oil and gas underlying the 70 acres, reserving one-fifth of the one-eighth royalty, would be liable on his warranty to Hoopengarner, Wharton, and Karnes & Co., or those claiming under them, but just to what extent it is not necessary to determine, for reasons hereinafter appearing; nor is it absolutely necessary for the decision of the case to construe the conveyance from the Headley heirs, and to determine whether or not it contains implied covenants of title and quiet enjoyment, but this question is presented by the record, and it is proper and just that it should be considered and determined; and to decide it is only to give two reasons, instead of one, why Mansfield Headley is not entitled to the relief he asks. * * *

The decree of the circuit court is reversed, and this cause is remanded, to be proceeded in and determined according to the principles herein announced, and according to the rules and principles governing courts of equity.

STEELSMITH v. GARTLAN et al.

1898. Supreme Court of Appeals of West Virginia.
45 W. Va. 27, 29 S. E. 978.

Bill by Amos Steelsmith against James Gartlan and others. Decree for defendants, and plaintiff appeals. Reversed.

Dent, J. On the 30th day of August, 1889, Knotts and Garber obtained a lease for oil purposes covering the land controversy in this suit, without other consideration than one-eighth of the oil produced and $200 per annum for each paying gas well, with the stipulation that the lessees should complete a well within one year from the date of the lease; and the failure to do so rendered the lease null and void unless the lessees should pay 25 cents per acre from and after the time above specified for the completion of said well, when such payment should operate to extend the time for five years. This lease David McGregor considered forfeited, and refused to accept the rent therefor, or continue the same in force. If the conditions had been performed by payment of rent accepted by the lessor, it would have expired the 30th of August, 1895, no well having been drilled by Knotts and Garber. On the 10th day of February, 1895, Matilda McGregor, as devisee and executor of David Mc-

Gregor, then deceased, executed the following lease to James Gartlan, to wit:

"An agreement, made the 11th day of February, A. D. 1895, between Matilda McGregor, of the district of Grant, county of Ritchie, and state of West Virginia, lessor, and James Gartlan, of Pittsburg, Pennsylvania, lessee, witnesseth: That the lessor, in consideration of one dollar, the receipt of which is hereby acknowledged, and of other valuable considerations, do hereby demise and grant unto the lessee, his heirs or assigns, all the oil and gas in and under the following described tract of land, and also the said tract of land, for the purpose and with the exclusive right of operating thereof for said gas and oil, together with the right of way, the right to lay pipes over and use water from said premises, and also the right to remove at any time all property placed thereon by the lessee, which tract of land is situated in the district of Grant, county of Ritchie, and state of West Virginia, and is bounded and described as follows, to wit: North by lands of Andrew Douglass and B. & O. Railroad, east by lands of Andrew Douglass and Jacob Hatfield, south by lands of A. M. Douglass and others, west by lands of Andy Hall and others, containing one hundred and twenty-two acres, more or less; to have and to hold the same unto the lessee, his heirs and assigns, for the term and period of five years from the date hereof, and so much longer as oil or gas is found in paying quantities thereon, yielding and paying to the lessor the one-eighth (⅛) part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit; and, should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of two hundred dollars per year for such well so long as the gas therefrom is sold, lessor to have gas for domestic use on the premises free, she making her own connections. Second party convenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the farm, and to pay all damages to growing crops by reason of operations. No well to be drilled on this lease within five hundred feet of the buildings as now located, without the consent of both parties. In case no well shall be completed on the above-described premises within one month from the date hereof, this lease shall become null and void, and without any further effect whatever, unless the lessee shall pay for further delay at the rate of fifty dollars per month in advance thereafter until a well shall be completed. Such payment may be made in hand or by deposit to the lessor's credit in Second National Bank of Parkersburg. If above-mentioned well produces 20 barrels of oil per day for the first 30 days after completion, the lessee agrees to drill 2 more wells on the above-mentioned premises within a year from the completion of the above-mentioned well; provided that the second well drilled produces 20

barrels of oil per day for the first 30 days after completion. If second well does not produce 20 barrels per day for first 30 days after completion, then it shall be optional with the lessee to drill the third well. All wells shall be served with the best known means to produce the greatest quantity of oil. A failure to comply with any of the conditions of this lease shall render the same null and void, and of no effect. It is agreed further that second party shall have the right at any time to surrender this lease to first party for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine, and the lease become absolutely null and void. It is understood that all the terms and conditions between the parties hereto shall extend and apply to their respective heirs, executors, administrators, and assigns. In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written. Matilda McGregor. [Seal.] Matilda McGregor, Executrix. [Seal.] ——— ——— [Seal.] James Gartlan. [Seal.]

"Sealed and delivered in presence of ——— ———."

Gartlan, with the assistance of others, put down a test hole about 1,800 feet by April following, but, finding neither gas nor oil in paying quantities, removed the derrick and tools, pulled the casing, and plugged the hole, and left the premises. At the same time he surrendered a number of other leases, but through his agent, Parks, asked permission of Mrs. McGregor to retain the lease under consideration for a short time. During the time the test was made the lessee paid Mrs. McGregor three monthly payments of $50 each, as stipulated, because of delay in completion of the first well. He then discontinued such payments, and entirely abandoned and ceased further operations for oil and gas on the premises. Mrs. McGregor, according to her testimony, before he stopped operations insisted that he should go deeper, and make a more thorough test, even being willing to part with a further portion of her interest in the result, if successful, if he would consent to do so. But, claiming that he had made a full test, he refused her request. Gartlan had taken a man by the name of Hays in with him. On the 17th of September, 1896, Mrs. McGregor wrote them the following letter:

"Cairo, W. Va., Sept. 17, 1896. Mess. Hays and Gartlan—Gentlemen: As you have abandoned the lease given you by me on our farm, and shown by your actions that you did not intend to operate it any further, I would ask you kindly to send it to me with a release deed, as I am now ready to lease again. Please give this your earliest attention, and oblige, M. McGregor."

Getting no reply from this, she wrote another letter to a Mr. Parks, who had acted as agent for Gartlan, to wit:

"Cairo, W. Va., Sept. 28, 1896. Mr. Parks—Sir: I wrote a letter some time ago to Mr. Gartlan and your uncle, asking them kindly

to send me the lease that they have been holding on my place. You know you only asked me to hold it for a short time, and now I think I have waited a sufficient time for them to make up their minds on what they intended to do; and they have shown, by abandoning the lease, that they did not intend to operate it, so I think they ought to send me the lease at once, so I could be making something out of it, as life is too short for me to let that amount of land lie idle, and not be making even the taxes off it. Now, please take this in consideration, and act on this at once, as you know I mean business. And I understand you have Mr. Gartlan's place in the Co. now. I don't know what position Gartlan holds in the company at this time. Now, do please give this your attention at once, as I am going to lease. I am going to get something out of it or nothing, as the case may be. That remains to be seen. I may get a 19½ barrel well next time and may be another dry hole. I can't tell. Now, you understand me. I am going to lease at once if I don't hear from you by return mail. Yours, in haste, your friend, M. McGregor."

To this she also received no reply, when she wrote a third letter, as follows, to wit:

"Cairo, W. Va., Oct. 3, 1896. Mr. Parks—Sir: I wrote you on the 28th Sept., asking for the lease that your Co. holds on my farm; asked you to answer me by return mail, and I think you have had sufficient time to write, and now I am going to write you again, and now I want an answer by wire, as I have no time to wait for mails. Well, Mr. Gartlan was here since and left again without doing anything. He still wants me to wait and see the Wilson and Church wells come in before he does anything, so that will develop the other two sides of the lease. I told him I was not willing to wait any longer; if he was going to do anything, now was the time to do it, while the excitement is up. I can lease now, and to a good advantage; but, if either of those wells should come in dry, it will give another black eye, and I could not lease it at all. So I think he is injuring me in holding this lease from me. and not going to work on it at once, and protecting the lines. If he is not willing to take a risk on it, I am not either. I told him if they wanted to hold it any longer they would have to pay me the back rental. I could have leased it long ago, and been getting more from it than the back rental is worth; but I feel conscientious in the matter, and did not feel disposed to give them any trouble over it, as you know I could by putting a lease on top of theirs. It might cause a lawsuit, at least, and that would cost them more than the rental. so you see I want to treat them fairly, and do what is right by them, if they will let me do so; but, if they will not, then the only thing left for me to do is to look out for myself and the interest of this estate which I represent. Mr. Gartlan promised me he would see your uncle just as soon as he reached Pittsburg, and wire me what he

was willing to do in the matter. Now, I will wait a sufficient time for his telegram, and also for yours, and, if I fail to get one, then I am going to lease at once. I have a good offer, and I am going to take it now while the excitement is up. I am offered more bonus than all the back rental comes to and the ¼ of the oil if there is any, and, if there is none, I will have the bonus anyway. Now you see my offer is a good one, and they can't blame me for taking it. And now for your lease, or the rental at once, as there is no time to wait, and you know I mean just what I say. So please let me hear from you at once by wire, as the parties are waiting, and are willing to take it at their own risk. Please see your uncle at once, and wire me his conclusion. We have a telegram office here at Cairo. Yours, in haste, M. McGregor."

Then, getting no satisfaction from the parties, either in the way of rentals or a new lease, on the 22d of October, 1896, she executed a new lease to Amos Steelsmith, the plaintiff and appellant in this case. In the meantime the parties claiming under the Gartlan lease moved some timbers on the land, as though in preparation for again boring, which Mrs. McGregor had cast off. Steelsmith, under his lease, proceeded forthwith to put down two wells, both coming in producers, when, before going to further expense, he filed his bill to cancel the Gartlan lease as a cloud on his title. The Gartlan lessees filed an answer in the nature of a cross bill, claiming the cancellation of Steelsmith's lease and the oil wells and their production, which was sustained by the court, and the relief sought granted. Knotts and Garber, also, to a supplemental and amended bill filed by Steelsmith, filed an answer in the nature of a cross bill, praying for affirmative relief, which was denied, and the bills were dismissed. Steelsmith appeals.

The question of importance presented to the court is as to whether the Gartlan lease was at an end at the time the Steelsmith lease was executed. The Gartlan lease is, with slight variance, in the usual form of such leases, and amounts to nothing more than the privilege of searching for oil and gas, and, if they be found in paying quantities, then vests an oil and gas tenancy in the lessee for the period of five years, or until exhaustion. Mrs. McGregor entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, in diligent search therefor, should find oil and gas in paying quantities. If such lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable, if not void, at the pleasure of either. Cowan v. Iron Co., 83 Va. 547, 3 S. E. 120; Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 18 S. W. 65. The only provision in the lease binding the lessee to prosecute operation thereunder with diligence is as follows:

"In case no well shall be completed within one month from the

date hereof, this lease shall become null and void, and without any further effect whatever, unless the lessee shall pay for further delay at the rate of $50 per month in advance thereafter until a well shall be completed. * * * If above-mentioned well produces 20 barrels of oil per day for the first 30 days after completion, the lessee agrees to drill 2 more wells on the above-mentioned premises within one year from the date of the completion of the above-mentioned well, provided that the second well drilled produces 20 barrels of oil per day for the first 30 days after completion."

There is no provision made for any further operations or payment of rent in case the first well, when completed, is nonproductive. But the contract is at an end as to both parties as soon as such first well is abandoned as unsuccessful. "A vested title cannot ordinarily be lost by abandonment in a less time than is fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite a different ground. The title is inchoate, and for the purpose of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned." Oil Co. v. Fretts, 152 Pa. St. 451, 25 Atl. 732; Plummer v. Iron Co., 160 Pa. St. 483, 28 Atl. 853; Crawford v. Ritchey, 27 S. E. 220, 43 W. Va. —. This unsuccessful search and abandonment in this case applies to the first well, the only one the lessee stipulated to put down unless gas and oil were found in paying quantities. He could not, as he himself maintains, be compelled to put down another well; and, he not being bound, the lessor was not bound either, for the only consideration left to her was the prospective oil royalties and gas rentals, which the lessee was in position to entirely defeat. Contracts unperformed optional as to one of the parties are optional as to both.

Nor can there be a different conclusion if it is held that the lease, being for the purpose of operating for oil and gas, is subject to the implied precedent condition, according to the decisions of some of the states, notably North Carolina, that the lessee shall diligently prosecute the search and operation, for in such case the forfeiture would follow in a much less time than 18 months under the general clause, to wit: "A failure to comply with any of the conditions of this lease shall render the same null and void and of no effect," which necessarily applies to implied as well as express conditions. Conrad v. Morehead, 89 N. C. 31; Maxwell v. Todd, 112 N. C. 677, 16 S. E. 926; Hawkins v. Pepper, 117 N. C. 407, 23 S. E. 434. In the case of Munroe v. Armstrong, 96 Pa. St. 307, it was held that a cessation of active operations for 30 days forfeited a lease for oil purposes. The court says, on page 310: "An oil lease yields nothing to the landowner when not worked, and is an incumbrance on his land, tying his hands against selling or leasing to others; but, when idle, it costs the lessee nothing, and is valuable, or may prove valuable, if he

can hold it waiting developments in its vicinity. If a well be productive, it is the interest of both the lessor and the lessee that it be continuously operated until its exhaustion, but, if dry, it is of no value. Holding on to a lease after ceasing search is often for purposes of speculation, the thing which a prudent landowner guards against. Forfeiture for nondevelopment or delay is essential to private and public interests in relation to the use and alienation of property."

In this case the condition was express, but the same rule applies with equal force to implied conditions. However, as before shown, the lessee having abandoned the only obligatory search provided for in his lease, it died on his hands without surrender, forfeiture, or intentional abandonment on his part, for he was without authority to make further explorations without the consent of and arrangement as to conditions with the lessor; in other words, without a new lease or extension of the old. Such leases are construed most strictly against the lessee and favorable to the lessor. Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271. When a lease provides the mode, manner, and character of search to be made, implications in regard thereto are excluded thereby as repugnant. And the demise for the purpose of operating for oil and gas for the period of five years is dependent on the discovery of oil and gas in the search provided for, and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise.

The lessee's title being inchoate and contingent, both as to the five-years limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a nonproductive well. This gave him no new or more extensive rights than he enjoyed before, but in fact destroyed all his rights under the lease. As is said in Williamson v. Jones, 27 S. E. 411, 43 W. Va. 562. "As an abortive well neither enhances the value nor yields anything to the true owner, he ought not to be charged with the costs thereof." The lessee would charge the expense of this abortive well as though it were a part of the consideration for this lease, when it was plainly evident that no such thing was ever had in contemplation by the parties, but this is a mere desperate afterthought to furnish a nonexistent money consideration for the continuance of the lease. A dry hole, plugged up and abandoned, while expensive to the lessee, is no advantage, but an incumbrance, to the lessor. Then why should she pay for it by a nonoperating and indefinite extension of the lease, to await the will and pleasure of the lessee, who claims the option to operate, abandon, surrender, or forfeit at his pleasure, while numerous others are clamoring for the privilege of diligent operation, and offering a large bonus therefor? Such a holding would be unconscionable, and contrary to both right

and justice. Mrs. McGregor's letters are given at length to show how fully she understood her rights, and yet how willing, out of tender womanly sympathy, she was, in consideration of her lessee's fruitless expenditures, for which she was in no wise responsible, to give her lessee the first option of a new lease. This she was not required to do, and it was wholly gratuitous on her part, but she did not surrender or lose any of her rights thereby. The reason that the lessee gives for the abandonment of the well and the removal and sale of his tools and machinery, being that he was endeavoring to escape the process of the courts of this state to avoid unjust litigation, is not a legal or justifiable excuse. In the case of Cryan v. Ridelsperger, 7 Pa. Co. Ct. R. 473, an excuse that the lessee was unable to put down a well on account of the extremely cold weather was held insufficient to prevent a forfeiture, and yet it was much more reasonable than the one given by the lessee in the present case. No excuse, though ever so good, could relieve from the operation of a contract which was at an end by virtue of its own terms. The time the Garber and Knotts lease had to run, in any event, expired before the Steelsmith lease was executed, and hence they have no rights against the latter lease and cannot attack it in any manner for any reason.

For the foregoing reasons the decree complained of is reversed, the lease known as the "Gartlan lease," bearing date the 11th day of February, 1895, is canceled, and annulled, and the injunction originally awarded in this case is made perpetual.

GADBURY ET AL v. OHIO & I. CONSOL. NATURAL & ILLUMINATING GAS CO.

1903. SUPREME COURT OF INDIANA. 162 Ind. 9, 67 N. E. 259.

ACTION by Riley R. Gadbury and another against the Ohio & Indiana Consolidated Natural & Illuminating Gas Company. Judgment for defendant. Plaintiffs appealed to the Appellate Court, whence the case is transferred, under Burns' Rev. St. 1901, § 1337j, subd. 2. 65 N. E. 289. Reversed.

GILLETT, J.—By their second paragraph of complaint, appellants seek to quiet their title to a certain tract of real estate, which they allege that they own in fee simple. The cloud that they seek to have removed was occasioned by the execution of a written contract by them and appellee's grantor, one Andrews, which contract is in the words and figures following:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we, R. R. Gadbury and J. A. Gadbury, first parties, hereby grant unto J. S. Andrews, second party, its successors and assigns, all the oil and gas in and under the following de-

scribed premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil, gas or water from said premises, excepting and reserving, however, to the first parties, the one-sixth (1-6) part of all oil produced and saved from said premises to be delivered in the pipe line with which second party may connect his wells, namely: All that certain lot of land situate in the township of Licking, county of Blackford, in the state of Indiana, bound and described as follows, to wit:

"The east half of the northwest quarter of section thirty-two, township twenty-three, north, range ten, east, containing eighty acres, more or less.

"To have and to hold the above premises on the following conditions: If gas only is found, second party agrees to pay one hundred dollars each year for the product of each well while the same is being used off the premises, and the first party to have gas free of cost for domestic purposes.

"Whenever first party shall request it, second party shall bury all oil and gas lines and pay all damages done to growing crops by reason of burying and removing said pipe lines.

"No wells shall be drilled nearer than two hundred feet to the house or barn on said premises, and no well shall occupy more than one acre. In case no well is completed within forty days from this date, then this lease shall become null and void, unless second party shall pay to first parties one dollar per day thereafter such completion is delayed. The second party shall have the right to use sufficient gas, oil or water to run all necessary machinery for operating said wells, and also the right to remove all its property at any time. It is understood between the parties to this agreement that all the conditions between the parties hereto shall extend to their heirs, executors and assigns.

"In witness whereof, the parties hereto have hereunto set their hands and seals this 1st day of December, A. D. 1897.

"[Signed] R. R. Gadbury.
"J. A. Gadbury.
"J. S. Andrews."

Said paragraph of complaint further alleges that said contract was assigned by said Andrews to said defendant on the 6th day of January, 1900; that there was no consideration for the execution of said contract by plaintiffs, except the income, rents, profits, and royalties referred to in said instrument; that said Andrews completed a well on said premises on the 19th day of February, 1898, and paid plaintiffs the sum of $1 per day during the time that completion of said well was delayed after 40 days from the execution of said contract down to the date last aforesaid; that, by the construction of said well, gas was found on said premises in large and paying quantities;

that, notwithstanding the discovery of said gas as aforesaid, said Andrews, immediately upon the completion of said well, closed and anchored the same, so as to prevent any gas from escaping therefrom, and neither said Andrews nor said defendant, nor any other person or corporation, has produced any gas or oil on or from said premises, nor have they, or either of them, used or transported any gas whatever from said premises; that neither said Andrews nor said defendant has ever paid the plaintiffs anything for the product of said well, or for the privilege of holding said premises after the completion of said well, and that the defendant since the date of said assignment has held, and still claims the right to hold, said premises without developing the same, and without producing any oil or gas therefrom, and without paying the plaintiffs any consideration whatever for the privilege of so doing, and without paying the plaintiffs anything whatever for the gas and oil which could be produced upon said premises; that, during all of the time since the execution of said lease, gas and oil have existed in and under said premises in large and paying quantities, and still continue so to exist, all of which was known to said Andrews and said defendant during all the time since the execution of said lease. It is further alleged in said paragraph of complaint that said Andrews and said defendant failed, neglected, and refused to give or furnish plaintiffs, or either of them, with any gas for domestic use; that on the 28th day of December, 1899, plaintiffs declared said contract forfeited, and all rights thereunder terminated, by reason of a failure to develop said premises and to produce gas or oil therefrom, and that plaintiffs did then and there take possession of said well, and connect the same with their dwelling house on said premises; and that said contract is a cloud upon plaintiffs' title. Prayer that said title be quieted. A demurrer was sustained to said paragraph of complaint, and an exception was duly reserved; and from a final judgment that appellants take nothing, they appeal, and assign error based on said ruling.

The grant in question, upon its face, appears to be a mere option to the grantee. Every express undertaking upon his part is subsidiary to the exercise of the option to explore and develop the real estate. The question arises, however, whether obligations to explore and develop the property may not be implied, and whether such undertakings, if implied, are not such an essential part of the contract as to be treated as conditions. An implied condition may be inseparably annexed to a grant, from its essence and constitution, although no condition be expressed in words. 2 Black. Com. p. *152; Petroleum Co. v. Coal, etc., Co., 89 Tenn. 381, 18 S. W. 65. In determining whether a condition is to be implied, it is important to note that the substantial consideration which moves a grantor to execute such a grant is the hope of profits or royalties if oil or gas is discovered. Even if the grantee in this case had paid the stated consideration of $1—a technically valuable consideration—yet we must

construe the instrument with the fact in view that a more substantial reason or reasons prompted the making of the grant. Huggins v. Daley, 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320; Federal Oil Co. v. Western Oil Co. (C. C.) 112 Fed. 373. In an ordinary agricultural lease, where the rent is payable in kind, it would, of course, be implied that the tenant would farm the land; and the requirement is implied that lessees in mineral leases, upon royalties, will develop the property, if exploration warrants it, where the minerals are stable, although the only result of a delay in operating would be to postpone the receipt of profits or royalties. Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452; McKnight v. Nat. Gas Co., 146 Pa. 185, 23 Atl. 164, 28 Am. St. Rep. 790. If a duty to operate is to be implied in such cases, there is much more reason for the implication in a grant of the right to operate for oil and gas upon a royalty, owing to the migratory habit of the fluids. "Oil leases," it was declared in McKnight v. Nat. Gas Co., supra, "must be construed with reference to the known characteristics of the business." As said in another Pennsylvania case: "The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under the influence of this pressure, enter into the contemplation of both parties to such an arrangement." Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109. In grants of the character in question, the title is inchoate, and for the purpose of exploration only, until oil or gas is found in quantities warranting operation; and while the courts manifest a disposition to protect the grantee at this stage, by treating his interest as no longer postponed to the happening of a condition precedent, yet it is thoroughly settled that he cannot omit to develop the property and hold the grant for speculative purposes purely. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655; Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493; Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901; Ray v. Nat. Gas Co., 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732; Kleppner v. Lemon, supra; Huggins v. Daley, 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320; Federal Oil Co. v. Western Oil Co. (C. C.) 112 Fed. 373; Hawkins v. Pepper, 117 N. C. 407, 23 S. E. 434.

The duty to develop the property upon the discovery of oil or gas in paying quantities is not to be regarded as a mere implied covenant, but, in a case like this, where practically the whole consideration must depend upon the implied undertaking, is to be treated as a condition subsequent. Conditions subsequent are not ordinarily favored, "because," as declared by Prof. Kent, "they tend to destroy estates, and the rigorous exaction of them is a species of summum jus, and in many cases hardly reconcilable with conscience." 4 Kent's Com. p. *129. Accordingly, it has been declared in unrestricted terms that equity will not lend its aid to enforce a forfeiture. Where there has

been a cause of forfeiture, followed by an entry upon the part of the grantor, so that the title has been lost, it is not strictly the enforcing of a forfeiture for a court of equity to decree a cancellation of the instrument. McClellan v. Coffin, 93 Ind. 456; Birmingham v. Lesan, 77 Me. 494, 1 Atl. 151. But even in a case of this kind, where the circumstances do not permit of an entry, the forfeiture may be, in effect, enforced by suit in equity. Forfeitures are usually against conscience and without equity, and it is for these reasons that courts of chancery ordinarily refuse relief in such cases, but an exception to the rule must exist where it be against equity to permit the defendant to longer assert his title. Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642; McClellan v. Coffin, 93 Ind. 456; Richter v. Richter, 111 Ind. 456, 12 N. E. 698. In the case last cited a stipulation was treated as a condition subsequent, rather than a covenant, and the grantor's title quieted, because of the lack of another remedy. In the case in hand specific performance could not be enforced (Louisville, etc., R. Co. v. Bodenschatz, 141 Ind. 251, 39 N. E. 703); and the completion of the first well having cut off the liquidated damages of $1 per day for non-completion and as no gas has been disposed of off the premises, there remains no measure of damages, for, while the damages would be substantial, they would be speculative. Foster v. Elk Fork, etc., Co., 32 C. C. A. 560, 90 Fed. 178; Federal Oil Co. v. Western Oil Co., (C. C.) 112 Fed. 373. The lack of any other remedy, and the danger that the gas might be withdrawn through wells on other lands, makes a case of this kind appeal to the conscience of the chancellor, and calls upon him to enforce the incurred forfeiture by removing the cloud from the title. In Munroe v. Armstrong, 96 Pa. 307, it was said concerning a gas and oil lease: "Forfeiture for non-development or delay is essential to private and public interests in relation to the use and alienation of property. In such cases as this, equity follows the law. In general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee whose lease is of no value till developed."

The next question that arises is whether the paragraph of complaint in question sufficiently shows that the interest conveyed by appellants to said grantee Andrews has been forfeited. An estate is not per se forfeited by the breach of a condition subsequent. Cross v. Carson, 8 Blackf. 138, 44 Am. Dec. 743; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638. It was a rule of the common law that, where an estate commenced by livery, it could not be determined before entry. 4 Kent's Com. p. *128. In Indiana a demand of possession, based on the breach, followed by a refusal, is equivalent to an entry on the premises. Clark v. Holton, 57 Ind. 564; Indianapolis, etc., R. Co. v. Hood, 66 Ind. 580; Cory v. Cory, 86 Ind. 567; Preston v. Bosworth, 153 Ind. 458, 55 N. E. 224, 74 Am. St. Rep. 313. Without determining whether this rule as to an entry should be applied to the grant of an easement or of a chattel interest (Roberts v. Davey, 1

Nev. & Man. 443), or whether it is enough for the grantor in such case to evince unequivocally his election, we think that it may be affirmed in this case that the forfeiture is sufficiently shown. Here the grant did not dispossess the appellants, and they could not enter upon themselves; and, besides, the failure for so long a time, without apparent excuse, to develop the property, prima facie authorized appellants, without demand, to treat the grant as abandoned. See Richter v. Richter, 111 Ind. 456, 12 N. E. 698; Cree v. Sherfy, 138 Ind. 354, 37 N. E. 787; Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452; Huggins v. Daley, 40 C. C. A. 12, 99 Fed. 608, 48 L. R. A. 320; Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901. As to election by suit, see Carnahan v. Tousey, 93 Ind. 561.

The facts stated in the second paragraph of complaint, which stand as admitted by the demurrer, were such as to require the court below to aid appellants, by means of its jurisdiction to decree cancellation and to remove clouds from titles. The judgment is reversed, with an instruction to the court below to overrule the demurrer to the second paragraph of complaint.

AYE ET AL. v. PHILADELPHIA CO.

1899. SUPREME COURT OF PENNSYLVANIA.
193 Pa. St. 451, 44 Atl. 555.

ACTION of ejectment by Fred Aye and others against the Philadelphia Company. There was a judgment for plaintiffs, and defendant appeals. Reversed.

The following is a history of the case from appellant's paper book: "This is an action of ejectment upon an oil and gas lease, the parties plaintiff and defendant claiming, respectively, under two different leases made by Campbell, the owner of the land. The defendant went into possession of the land in 1894, and drilled a well; having previously acquired, by assignment, a lease made by Campbell in 1891 to Bailey. This action was brought April 3, 1897; the plaintiffs' claim being based upon a prior lease from Campbell, dated July 11, 1887. When the defendant acquired the Bailey lease and entered into possession, the plaintiffs' lease had not been recorded, nor had the plaintiffs at any time, between 1887 and 1894, entered upon the land, or done anything whatever towards drilling or developing the property for the production of oil or gas, nor had they paid any rentals whatever to Campbell. The Bailey lease, under which defendant claims, contained a clause which gave notice that the earlier lease under which plaintiffs claim had been made, but without affirming its existence or validity at the date of the Bailey lease. The de-

fendant's contention was that the plaintiffs' rights under the first lease had been lost or abandoned by failure to operate thereunder with reasonable diligence. At the trial the court gave the jury peremptory instructions to find in favor of the plaintiffs, and the defendant appealed."

MITCHELL, J.—The lease to Aye and Martin being referred to in the lease from Campbell to Bailey, the appellant, as assignee of Bailey, must be held to have taken with notice. The recital of the prior lease, however, was not an affirmance by Campbell of its continuing validity, but a disclaimer by him of responsibility on that subject. It was a refusal to declare or enforce a forfeiture himself, but a transfer of his right in that regard, whatever it might turn out to be, to appellant, which assumed the risk. Its entry and commencement of operations on the land were an enforcement of a forfeiture for abandonment, if Campbell had that right. This depends on the circumstances. By their lease from Campbell, the appellees covenanted to complete a test well in the vicinity within six months, and, if oil should be found in paying quantities, to complete a well on the leased premises within the next six months, or pay a yearly rental per acre for the delay. The royalty reserved as rent by the lessor was one-eighth of the oil produced. The lease was made July 11, 1887. The test well was put down on a farm in the vicinity, but produced no oil. A second well was drilled on another farm, with like result, and operations then ceased, without any well on the leased premises. On October 2, 1891, Campbell leased to Bailey, and on June 19, 1892, Bailey assigned his lease to the appellant. The lease from Campbell to appellees, it will be seen, contained express covenants what the lessees should do in a certain event, but made no provision for the contingency of the test well proving dry, which is what actually happened. In such case, it becomes necessary to inquire what covenants, if any, are implied. It was held, as far back as Watson v. O'Hern, 6 Watts, 362, that a lease of a stone quarry, in consideration that the lessee shall pay a certain price per perch for all stone taken out, though called by the parties a "privilege and liberty," is a contract by the lessee that the quarry shall be worked, and failure to do so is an actionable breach. The rule is thus stated by the present chief justice in Koch & Balliet's Appeal, 93 Pa. St. 434, 442: "Where a right to mine iron ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income which both parties must have had in contemplation when the agreement was entered into." So, in Ray v. Gas Co., 138 Pa. St. 576, 589, 20 Atl. 1065, it was said by our late Brother Clarke: "While the obligation on the part of the lessee to operate is not expressed in so many words, it arises by necessary implication. * * * If a farm is leased for farming

purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied." That was the case of an oil and gas lease, and it has been said that the doctrine is peculiarly applicable to such leases, owing to the nature of the product. McKnight v. Gas Co., 146 Pa. St. 185, 23 Atl. 164; Oil Co. v. Fretts, 152 Pa. St. 451, 25 Atl. 732.

The rule in regard to contracts is that, where the parties have expressly agreed on what shall be done, there is no room for the implication of anything not so stipulated for, and this rule is equally applicable to oil and gas leases as to other contracts. There is nothing peculiar about them in this respect. But here the parties have provided for a test well, and for what shall be done if it produces oil in paying quantities. But the other contingency, that it proves dry, is not provided for, and it is the omitted case that has occurred. The authorities are uniform that, under such circumstances, there is an implied obligation on the lessee to proceed with the exploration and development of the land with reasonable diligence, according to the usual course of the business, and a failure to do so amounts to an abandonment which will sustain a re-entry by the lessor. Abandonment is a question of fact, to be determined by the acts and intentions of the parties. An unexplained cessation of operations for the period involved in this case gives rise to a fair presumption of abandonment, and, standing alone and admitted, would justify the court in declaring an abandonment as matter of law. But it may be capable of explanation, and is therefore usually a question for the jury on the evidence of the acts and declarations of the parties. Stage v. Boyer, 183 Pa. St. 560, 38 Atl. 1035. It should have been so left to them in this case. Judgment reversed, and venire de novo awarded.

BREWSTER v. LANYON ZINC CO.

1905. Circuit Court of Appeals, Eighth Circuit.
72 C. C. A. 213, 140 Fed. 801.

Appeal from the Circuit Court of the United States for the District of Kansas.

This was a suit in equity to establish, as matter of record, the forfeiture of an oil and gas lease and to cancel the same as a cloud upon complainant's title. The suit was commenced December 31, 1901, in the district court of Allen county, Kan., and was removed into the Circuit Court on defendant's petition. To an amended bill filed February 20, 1904, defendant demurred, assigning as causes therefor want of equity in the bill and the existence of

a full, complete, and adequate remedy at law. The demurrer was sustained, and, as complainant declined to amend, a decree was entered dismissing the bill. Complainant appeals. The facts stated in the amended bill are these:

The lease was made by complainant to the Palmer Oil & Gas Company, October 28, 1895, and is as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, M. L. Brewster (Widow), first party, hereby grants unto the Palmer Oil & Gas Company of Fostoria, Ohio, second party, successors and assigns, all the oil and gas under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas, or water, to erect, maintain, and remove all buildings, structures, pipes, pipe lines, and machinery necessary for the production and transportation of oil, gas, and water: Provided, that the first party shall have the right to use said premises for farming purposes except such part as is actually occupied by second party, namely, a lot of land situated in the township of Iola and Elm, county of Allen, in the state of Kansas, and described as follows, to wit: N. ½ of N. W. ¼ of section 2—25—18; also S. ½ of S. E. ¼ of section 5—25—19, less 7½ acres off the west end; also S. W. ¼ of section 21—24—19 section number 2—5—21—township number 25—24, range number 18—19, containing three hundred and twelve and 50-100 acres more or less.

"The above grant was made on the following terms: (1) Second party agrees to drill a well upon said premises within two years from this date, or thereafter pay to the first party seventy-eight dollars annually until said well is drilled, or the property hereby granted is conveyed to the first party. (2) Should oil be found in paying quantities upon the premises second party agrees to deliver to first party in tank or in the pipe line with which it may connect the well or wells the one-tenth part of all the oil produced and saved from said premises. (3) Should gas be found, the second party agrees to pay first party fifty dollars annually for every well from which gas is used off the premises. (4) The first party shall be entitled to enough gas free of cost for domestic use in the residence on said premises as long as second party shall use gas off said premises under this contract, but shall lay and maintain the service pipes at his own expense and use the gas at his own risk. The said party of the second part further to have the privilege of excavating for water and of using sufficient water, gas, and oil from the premises herein leased to run the necessary engines for the prosecution of said business. (5) Second party shall bury, when requested so to do by the first party, all gas lines used to conduct gas off said premises, and pay all damages to timber and crops by reason of drilling or the burying, repairing, or removal of lines of pipe over the said premises. (6) No well shall be drilled nearer than three hundred feet to any building on said premises, nor occupy more than one acre. (7) Second party may at any time remove all his property and reconvey the premises hereby granted, and thereupon this instrument shall be null and void. (8) A deposit to the credit of lessor in the Bank of Allen County, to the account of any of the money payments herein provided for shall be a payment under the terms of this lease. (9) If no well shall be drilled upon said premises within five years from this date, second party agrees to reconvey, and thereupon this instrument shall be null and void. (10) A failure of second party to comply with any of the above conditions renders this lease null and void."

The lease was assigned in February, 1899, to Thomas L. Hughes, and he, in March following, assigned it to defendant. It covered three separate and distinct tracts. In June, 1899, the complainant sold and conveyed the tract in section 2 to one Holmes, who in July following sold and conveyed it to the Iola Portland Cement Company, which is not a party to the suit. Complainant continues to own the tracts in sections 5 and 21, and has actual possession

thereof, save as defendant may have such occupancy of a portion of the tract in section 5 as is incident to the operation of the gas well thereon. No well was drilled during the first four years after the date of the lease, but the stipulated sum of $78 was paid to complainant during each of the third and fourth years. In August, 1900, during the fifth year, a well was drilled on the tract in section 5 from which gas was obtained in paying quantity. Gas from this well has ever since been used off the premises by the defendant in its business of smelting and refining ores. When the suit was commenced, which was 14 months after the expiration of the 5-year period and 16 months after the drilling of the single well, nothing more had been done by defendant in compliance with the terms of the lease, express or implied, save that the required annual payment of $50 for the gas so used off the premises may have been made—a matter in respect of which the bill is uncertain. Many oil and gas wells have been drilled in the territory adjacent to and surrounding the tracts leased, which furnish oil and gas in paying quantities, and new wells are being drilled and operated in that territory. These wells are so near to the tracts leased as to drain the same of a good portion of the oil and gas therein, and therefore they render the lease of much less value to complainant than it would have been had defendant proceeded with reasonable diligence to drill other wells and to operate the same for the mutual benefit of the parties. The extent of this drainage is not susceptible of reasonable ascertainment, and therefore the consequent injury to complainant cannot be adequately compensated in damages. Defendant has at all times insisted, and still insists, that by drilling the single well it acquired the right to all the oil and gas in the leased tracts, and also the right to hold the lease indefinitely, without further development or doing more than paying annually $50 for the gas from that well used off the premises. It has been and is defendant's purpose to hold the lease either for speculative purposes or to prevent the oil and gas from being used by its rivals in business. Seven days before the commencement of the suit complainant notified defendant in writing that she elected to declare the lease terminated, null, and void, and demanded a surrender and cancellation of the same; but the demand was not complied with. As matter of convenience the defendant will generally be spoken of as the lessee, although it is in fact an assignee.

Before VAN DEVANTER, HOOK and ADAMS, Circuit Judges.

VAN DEVANTER, Circuit Judge.[8]—* * *

Other allegations are to the effect that the lease was without consideration, save the payment of $1, which, though technically valuable, was merely nominal, and that its terms were altogether unconscionable. These allegations, even if not withdrawn by counsel's concession that "complainant's rights were fully protected," are essentially restrained by the provisions of the lease and by other allegations in the bill. The lease recites that it is made in consideration "of the covenants and agreements hereinafter contained," as well as of the $1 then paid, and this recital is followed by several covenants and agreements on the part of the lessee, the performance of which would be of substantial, if not great, benefit to the lessor, and would be at substantial, if not great, cost to the lessee. There is a further stipulation to the effect that the lessee's failure to comply with any of these covenants or agreements shall render the lease void. It appears from the bill that when the lease was made

[8] Parts of the opinion are omitted.

the development of oil and gas in that field was in its infancy. The field was practically undeveloped and its extent was unknown. Experience in other oil and gas fields had demonstrated that wells drilled in the vicinity of producing wells were not infrequently unproductive. The only method of certainly determining whether or not particular lands contained oil or gas in paying quantity was by drilling thereon to a considerable depth. This was attended with great expense. The lease placed the hazard incident to the uncertainty of the undertaking on the lessee. It was to pay the entire expense and was to bear the loss if the undertaking resulted in failure. In these circumstances it cannot be said that the terms of the lease were unconscionable. * * *

The position is taken in the bill that by reason of the clause which declares: "Second party [the lessee] may at any time remove all his property and reconvey the premises hereby granted, and thereupon this instrument shall be null and void"—the lease was wanting in mutuality, was determinable at the will of the lessee, and was therefore equally determinable at the will of the lessor. The position is not sound. Although the parties, with the sanction of a general practice, denominated the instrument a "lease," strictly speaking it was not such, but was more in the nature of a grant in præsenti of all the oil and gas in the lands described—these minerals being part of the realty—with the right to enter and search for them, and to mine and remove them when found. Lanyon Zinc Co. v. Freeman (Kan.) 75 Pac. 995; Dickey v. Coffeyville Vitrified Brick & Tile Co. (Kan.) 76 Pac. 398. Because, however, of the designation given to the instrument by the parties, it is here spoken of and treated as a lease. It runs to the lessee, its successors, and assigns, is without limitation as to time, and plainly shows that it is designed to be perpetual, if the oil or gas shall continue, and the lessee and those claiming under it shall fulfill its stipulations. True, it was made and accepted upon certain conditions, one of which is that the premises may be reconveyed at any time at the option of the lessee; but that does not make the estate which it creates a mere tenancy at will within the operation of the common-law rule that an estate at the will of one party is equally at the will of the other. That rule is without application to a lease for a defined and permissible term, but which reserves to the lessee an option to terminate it before the expiration of the term. Archbold's Landlord and Tenant, 92; Dann v. Spurrier, 3 Bos. & Pul. 399; Doe v. Dixon, 9 East. 15. The present lease is of this type. It is essentially one in perpetuity. Such a term is permissible in the state of Kansas, where the creation of leaseholds in real property is almost entirely a matter of contract between the parties. Dickey v. Coffeyville Vitrified Brick & Tile Co., supra; Effinger v. Lewis, 32 Pa. 367. The option reserved to the lessee was not designed to convert the estate, as otherwise defined, into a mere tenancy at will, or to make it determinable at any time at the

option of the lessor. The lease expresses the intention of the parties, and, no rule of law forbidding, that intention is controlling. The consideration of $1, the receipt of which was acknowledged, although small, was yet sufficient to make the lease effective and to support every stipulation in it favorable to the lessee, including the option to surrender it at any time. Brown v. Fowler, 65 Ohio St. 507, 525, 63 N. E. 76; Gas Co. v. Eckert, 70 Ohio St. 127, 135, 71 N. E. 281; Davis v. Wells, 104 U. S. 159, 168, 26 L. Ed. 686; Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 608, 106 Fed. 764, 767. Resting, therefore, upon an executed and valuable consideration, the lease was not wanting in mutuality merely because it reserved to one party an option which it withheld from the other. Brown v. Fowler and Gas Co. v. Eckert, supra; 9 Cyc. 334.

The further position is taken in the bill that the lessor was entitled to avoid the lease, because it covers three tracts separated by distances of from 8 to 14 miles, and because no well was drilled on two of the tracts within five years. That is a matter in respect of which it was competent for the parties to stipulate, and in respect of which they did stipulate, as shown by the following clauses of the lease:

"(1) Second party [the lessee] agrees to drill a well upon said premises within two years from this date, or thereafter pay to first party [the lessor] seventy-eight dollars annually until said well is drilled, or the property hereby granted is conveyed to the first party."

"(9) If no well shall be drilled upon said premises within five years from this date, second party agrees to reconvey, and thereupon this instrument shall be null and void."

The purpose and effect of these clauses was plainly (1) to give the lessee two years within which to drill a well (not three wells, but one) upon the leased premises—not each tract, but the entire premises; (2) to enlarge that time, but not beyond five years, on condition that the lessee should pay an annual rental of $78 from the expiration of the second year until the well should be drilled; and (3) to entitle the lessor to a reconveyance of the premises if no well—none at all—should be drilled thereon within five years. Thus the measure of diligence which the lessee was required to exercise in prosecuting the work of exploration and development during the first five years was expressly and definitely prescribed, and was not left to any implication which otherwise might arise from the nature of the lease or from the other stipulations therein. It is appropriate to here refer to what was well said by the Supreme Court of Kansas, in disposing of a somewhat similar question, in the case of Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 Pac. 625:

"If plaintiffs should desire to contract for an immediate exploration, they must have that right; and if they should desire to give an oil or gas company five years in which to sink a well, upon a consideration satisfactory to themselves, and as the result of negotiations free from imposition and

fraud, they must have that right. But, having deliberately made a contract of the latter description, they have no right to call upon a court to declare that it is of the other kind, merely because generally it might seem to be better for farmers not to incumber their lands with mineral leases, giving a long time for exploration, or because generally such leases do contemplate that forfeiture shall follow a failure to explore at once."

As it is admitted that a well producing gas in paying quantity was drilled on the leased premises during the fifth year and that the stipulated annual rental was paid from the end of the second year until the well was drilled, it follows that the prescribed measure of diligence was exercised, and the lease was not avoidable because other wells were not drilled during the five-year period. Monfort v. Lanyon Zinc Co., 67 Kan. 310, 72 Pac. 784.

The complaint has proceeded upon the assumption that a failure on the part of the lessee to comply with any condition of the lease entitles her to avoid it as to all of the three tracts embraced therein; but as she is shown by the bill to have long since parted with the ownership of one of the tracts, and as the present owner is not a party to the bill, it is obvious that no relief can be granted in respect of that tract. No reference is made by learned counsel for the appellee to the rule that, where the reversion in part of the demised lands is assigned, neither the lessor nor the assignee can take advantage of a condition broken, because the condition, being entire, is not apportioned by the assignment, but destroyed. Co. Litt. 215a; 1 Taylor's Landlord & Tenant (8th Ed.) § 296; 2 Wood's Landlord & Tenant (2d Ed.) § 512; Leake on Contracts (4th Ed.) 874; 2 Cruise on Real Property, tit. 13, c. 2, § 58; 1 Washburn on Real Property (5th Ed.) 508; 18 Am. & Eng. Enc. 393; Wright v. Burroughes, 3 C. B. 685; Twynam v. Pickard, 2 B. & Ald. 105. It is therefore assumed that the rule is not in force in the state of Kansas.

The questions arising on this appeal to which attention is chiefly given in the briefs are these: (1) Did the lessee expressly or impliedly covenant and agree to continue, with reasonable diligence, the work of exploration, development, and production after the expiration of the five-year period, if oil and gas, one or both, should be found in paying quantities? (2) Was compliance with this covenant and agreement made a condition, the breach of which would entitle the lessor to avoid the lease? (3) Is such a breach shown by the bill? (4) Is the lessor entitled to relief in equity?

It is conceded, as indeed it must be, that the lease contains no express stipulation as to what, if anything, should be done in the way of searching for and producing oil or gas after the first five years; but it does not follow from this that it is silent on the subject, or that the matter is left absolutely to the will of the lessee. Whatever is implied in a contract is as effectual as what is expressed. Implication is but another name for intention, and if it arises from the language of the contract when considered in its entirety, and is not

gathered from the mere expectations of one or both of the parties, it is controlling. Light will be thrown upon the language used, and the intention of the parties will be better reflected, if consideration is given to the peculiar and distinctive features of the mineral deposits which are the subjects of the lease. Oil and gas are usually found in porous rock at considerable depth under the surface of the earth. Unlike coal, iron and other minerals, they do not have a fixed situs under a particular portion of the surface, but are capable of flowing from place to place and of being drawn off by wells penetrating their natural reservoir at any point. They are part of the land, and belong to the owner so long as they are in it, or are subject to his control; but when they flow elsewhere, or are brought within the control of another by being drawn off through wells drilled in other land, the title of the former owner is gone. So, also, when one owner of the surface overlying the common reservoir exercises his right to extract them, the supply as to which other owners of the surface must exercise their rights, if at all, is proportionally diminished. Lanyon Zinc Co. v. Freeman (Kan.) 75 Pac. 995; Brown v. Spilman, 155 U. S. 665, 669, 15 Sup. Ct. 245, 39 L. Ed. 304; Ohio Oil Co. v. Indiana (No. 1) 177 U. S. 190, 203–208, 20 Sup. Ct. 576, 44 L. Ed. 729; Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 684, 74 Pac. 296.

Looking, then, to the present lease, it is seen that the real subject thereof was the oil and gas believed to be in or obtainable through the lessor's land, and the right to search for them and to reduce them to possession. The terms of the lease, material to the present inquiry, were in effect as follows: The consideration was primarily $1 paid at the time, but secondarily the covenants and agreements of the lessee. The grant was of "all the oil and gas" under the premises described, together with the right to enter "at all times" for the purpose of "drilling and operating," to erect and maintain structures, pipe lines, and machinery necessary for the "production and transportation" of oil and gas, and to use sufficient water, oil, and gas to run the necessary engines for the "prosecution of said business." The grant was stated to be "on the following terms," and then followed several stipulations, among which were these express covenants and agreements on the part of the lessee: (1) To drill a well within two years, with a right to enlarge the time to five years by the payment of an annual rental of $78 from the end of the second year until a well should be drilled. (2) To drill no well nearer than 300 feet to any building on the premises, and to occupy not exceeding one acre of the surface in connection with any well. (3) "Should oil be found in paying quantities," to deliver to the lessor one-tenth of all the oil "produced and saved." (4) "Should gas be found," to pay to the lessor $50 annually for "every well" from which gas should be used off the premises. The concluding stipulation was that a failure on the part of the lessee to comply

with "any of the above conditions" should render the lease null and void. The implication necessarily arising from these provisions—the intention which they obviously reflect—is that if, at the end of the five-year period prescribed for original exploration and development, oil and gas, one or both, had been found to exist in the demised premises in paying quantities, the work of exploration, development, and production should proceed with reasonable diligence for the common benefit of the parties, or the premises be surrendered to the lessor. That this was of the very essence of the contract is shown by the extensive character of the grant, which was without limit as to time and included all the oil and gas in or obtainable through the demised premises; by the provisions for the payment of substantial royalties in kind and in money on the oil produced and saved and the gas used off the premises, which, as contrasted with the consideration paid when the lease was executed, shows that the promise of these royalties was the controlling inducement to the grant; and by the provisions contemplating the drilling and operation of wells, the production and transportation of oil and gas, and the prosecution of that business subject to the restrictions prescribed.

Considering the migratory nature of oil and gas, and the danger of their being drawn off through wells on other lands if the field should become fully developed, all of which must have been in the minds of the parties, it is manifest that the terms of the lease contemplated action and diligence on the part of the lessee. There could not well have been an express stipulation as to the number of wells to be drilled, as to when the wells, other than the first, should be drilled, or as to the rate at which the production therefrom should proceed, because these matters would depend in large measure upon future conditions, which could not be anticipated with certainty, such as the extent to which oil and gas, one or both, could be produced from the premises, as indicated by the first well and any others in the vicinity, the existence of a local market or demand therefor or the means of transporting them to a market, and the presence of wells on adjacent lands capable of diminishing or exhausting the supply in the natural reservoir. The subject was, therefore, rationally left to the implication, necessarily arising in the absence of express stipulation, that the further prosecution of the work should be along such lines as would be reasonably calculated to effectuate the controlling intention of the parties as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit. Even in respect of the first well, if oil or gas was found in paying quantity, there was no express engagement to operate it; but that it was intended to be operated was plainly implied in the engagement to pay royalties to be gauged according to the production of oil and the use of gas. Whatever is necessary to the accomplishment of that which is expressly contracted to be done is part and parcel of the contract, though not

specified. Godkin v. Monahan, 27 C. C. A. 410, 415, 83 Fed. 116; Lawler v. Murphy, 58 Conn. 309, 20 Atl. 457, 8 L. R. A. 113; Savage v. Whitaker, 15 Me. 24; Currier v. Boston & Maine R. R., 34 N. H. 498, 510.

In Harris v. Ohio Oil Co., 57 Ohio St. 118, 127, 48 N. E. 502, 505, it was said by the Supreme Court of Ohio, in considering whether a similar lease contained an implied covenant for the drilling of a reasonable number of wells:

"On principle, it would seem that there is such implied covenant in the written instrument. When no time is fixed for the performance of a contract, a reasonable time is implied. When a contract for the erection of a house or other structure is silent as to the quality or the materials or workmanship, it is implied that the same should be of reasonable quality. In a lease of a farm for tillage on the shares, it is implied that the tenant shall cultivate the farm in the manner usually done by reasonably good farmers. So, under an oil lease which is silent as to the number of wells to be drilled, there is an implied covenant that the lessee shall reasonably develop the lands and reasonably protect the lines."

And the decisions in other states in which the question has arisen have been uniformly to the same effect. Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764; McKnight v. Manufacturers' Natural Gas Co., 146 Pa. 185, 199, 23 Atl. 164, 28 Am. St. Rep. 790; Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109; Koch's and Balliett's Appeal, 93 Pa. 434, 441; Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555; Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 684, 74 Pac. 296; Gadbury v. Ohio & Indiana Consolidated Natural & Illuminating Gas Co. (Ind.) 67 N. E. 259, 62 L. R. A. 895; Consumers' Gas Trust Co. v. Littler (Ind.) 70 N. E. 363; Island Coal Co. v. Combs (Ind.) 53 N. E. 452, 455; Parish Fork Oil Co. v. Bridgewater Gas Co. (W. Va.) 42 S. E. 655, 59 L. R. A. 566; J. M. Guffey Petroleum Co. v. Oliver (Tex. Civ. App.) 79 S. W. 884; Conrad v. Morehead, 89 N. C. 31; Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co., 61 C. C. A. 359, 361, 126 Fed. 623; Kellar v. Craig, 61 C. C. A. 366, 369, 126 Fed. 630. See, also, United States v. Bostwick, 94 U. S. 53, 65, 24 L. Ed. 65; 2 Washburn on Real Property (5th Ed.) 12.

Upon both principle and authority it must be held that the present lease contains a covenant by the lessee to continue, with reasonable diligence, the work of exploration, development, and production at the end of the five years, if during that time oil and gas, one or both, are found in paying quantities. It does not militate against this conclusion that the lessee can at its option surrender the lease at any time, because until that is done the lessee is equally bound by all of its covenants, whether express or implied. The option does not entitle it to do less than to entirely surrender the lease and to thereby enable the lessor to herself exercise the right to extract the oil and gas from her lands or to negotiate a new lease to that end.

The covenants of the lessee are introduced into the lease by the statement that the grant is made "on the following terms," and are followed by a stipulation that the lessee's failure to comply with "any of the above conditions" shall render the lease null and void. These provisions make it plain that it was the intention of the parties to make the covenants of the lessee conditions as well as covenants, and to reserve to the lessor the right to avoid the lease for the breach of any of them. But it is insisted that the words "any of the above conditions" refer to what is expressed, and not to what is implied, or, to state it differently, that they refer to the mere letter of the preceding stipulations and not to their spirit or legal effect. To so hold would be to declare the lease avoidable if the lessee fails to deliver one-tenth of all the oil produced and saved, or to pay the annual rental for gas used off the premises, but not avoidable if the lessee, having found oil and gas in paying quantities, ceases development and production, at a time when these fluids are being drawn off through wells on adjacent lands, and thereby jeopardizes the controlling object of the lease. And it would seem that to so hold might result in the lessor being practically without any remedy for the breach of the covenant for further development and production, inasmuch as specific performance cannot be had against one having an option to terminate the contract at any time (Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. Ed. 955; Express Co. v. Railroad Co., 99 U. S. 191, 200, 25 L. Ed. 319; Federal Oil Co. v. Western Oil Co., 57 C. C. A. 428, 121 Fed. 674; Rust v. Conrad [Mich.] 11 N. W. 265, 41 Am. Rep. 720), and as the obvious difficulty in establishing the amount of oil and gas in the demised premises, or the amount diverted therefrom by the wells on adjoining lands, would be a serious obstacle to the recovery of adequate damages at law. But, however this may be, the present insistence is not well grounded. The question is essentially one of intention (4 Kent's Com. *132; Doe v. Elsam, M. & M. 189; Faylor v. Brice, 7 Ind. App. 551, 34 N. E. 833), and the words "any of the above conditions" must be given effect in the sense in which they were used by the parties. They are very comprehensive, and were evidently designed to refer, not merely to the letter, but to the spirit and legal effect of the preceding stipulations, and therefore to every covenant of the lessee which is part of them. The error in the insistence to the contrary is that it fails to give effect to the well-established rule that a covenant arising by necessary implication is as much a part of the contract—is as effectually one of its terms—as if had been plainly expressed. United States v. Bostwick, 94 U. S. 53, 66, 24 L. Ed. 65; United States v. Babbitt, 1 Black, 55, 61, 17 L. Ed. 94; Bulkley v. United States, 19 Wall. 37, 40, 22 L. Ed. 62; Cornett v. Williams, 20 Wall. 226, 250, 22 L. Ed. 254; Hearne v. Marine Ins. Co., 20 Wall. 488, 493, 22 L. Ed. 395; Supervisors v. Lackawanna Iron, etc.,

Co., 93 U. S. 619, 624, 23 L. Ed. 989; Godkin v. Monahan, 27 C. C. A. 410, 415, 83 Fed. 116.

The conclusion is that compliance with the covenant to continue with reasonable diligence the work of exploration, development, and production after the expiration of the five-year period, if during that time oil and gas, one or both, be found in paying quantities, is by the terms employed made a condition the breach of which entitles the lessor to avoid the lease. In this view it becomes unnecessary to consider whether, if the covenant were not made a condition, its breach would constitute a ground for complete or partial forfeiture in equity—a matter in respect of which the courts have divided in opinion. What constitutes a breach of such a covenant has been the subject of consideration in several cases. McKnight v. Manufacturers' Natural Gas Co., 146 Pa. 185, 200–203, 23 Atl. 164, 28 Am. St. Rep. 790; Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109; Id. 198 Pa. 581, 48 Atl. 483; Colgan v. Forest Oil Co., 194 Pa. 234, 45 Atl. 119, 75 Am. St. Rep. 695; Koch's & Balliett's Appeal, 93 Pa. 434, 442; Harris v. Ohio Oil Co., 57 Ohio St. 118, 127, 48 N. E. 502; Coffinberry v. Sun Oil Co. (Ohio) 67 N. E. 1069; Gadbury v. Ohio & Indiana Consolidated Natural & Illuminating Gas Co. (Ind.) 67 N. E. 259, 62 L. R. A. 895; Kellar v. Craig, 61 C. C. A. 366, 369, 126 Fed. 630. The decisions have not been entirely harmonious, and well illustrate the difficulty of laying down any comprehensive rule in respect of a question which is so largely one of fact that it must be resolved in each case according to its particular circumstances. In some of the cases, notably Kellar v. Craig and Colgan v. Forest Oil Co., supra, it seems to be held that the question of what is reasonable in the way of continued exploration and development, where there is no specific stipulation on the subject, is committed to the judgment of the lessee, whose determination, if made honestly and in good faith, is conclusive, much as is the decision of an engineer under a construction contract which expressly makes him the final arbiter of all questions relating to the amount and character of the work done, its conformity to the contract, and the price to be paid. Guild v. Andrews (C. C. A.) 137 Fed. 369; Chocktaw & Memphis R. R. Co. v. Newton (C. C. A.) 140 Fed. 225.

Thus it is said in Kellar v. Craig:

"In all leases for oil and gas purposes, a covenant to 'protect the lines' of and 'well develop' the land leased is implied by law, and so it follows that the general words relating to those matters, inserted in the lease under consideration, really add nothing to the obligations assumed by the lessee concerning such work. In such leases, where general covenants of that character are found or are implied, the lessee or his assigns are permitted to determine the character of the work to be done, and such ascertainment by him or them, in the absence of fraud, disposes of the question."

And in Colgan v. Forest Oil Co. it is said:

"So long as the lessee is acting in good faith on business judgment, he is not bound to take any other party's, but may stand on his own. Every man who invests his money and labor in a business does it on the confidence he has in being able to conduct it in his own way. No court has any power to impose a different judgment on him, however erroneous it may deem his to be. Its right to interfere does not arise until it has been shown clearly that he is not acting in good faith, on his business judgment, but fraudulently, with intent to obtain a dishonest advantage over the other party to the contract."

With great deference to the able courts which have adopted this view, we think it is not sound. In the absence of some stipulation to that effect, we think an oil and gas lease cannot be said to make the lessee the arbiter of the extent to which, or the diligence with which, the exploration and development shall proceed. The operations contemplated, in the event oil and gas are found in paying quantities, are not to be likened unto a business into which one puts property, money, and labor exclusively his own, the profits and losses in which are of concern only to him, and the conduct of which may be according to his own judgment, however erroneous it may be. By reason of the conditions on which the lease is granted the lessor retains at least a contingent interest in the oil and gas, to the profitable extraction of which the operations are directed. This interest in the subject of the lease, and the fact that the substantial consideration for the grant lies in the provisions for the payment of royalties in kind and in money on the oil and gas extracted, make the extent to which and the diligence with which the operations are prosecuted of immediate concern to the lessor. If they do not proceed with reasonable diligence, and by reason thereof the oil and gas are diminished or exhausted through the operation of wells on adjoining lands, the lessor loses, not only royalties to which he would otherwise be entitled, but also his contingent interest in the oil and gas which thus passes into the control of others. The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule in respect of all other contracts where the time, mode, or quality of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases. There can, therefore, be a breach of the covenant for the exercise of reasonable diligence, though the lessee be not guilty of fraud or bad faith.

But, while this is so, no breach can occur save where the absence of such diligence is both certain and substantial in view of the actual circumstances at the time, as distinguished from mere expectations on the part of the lessor and conjecture on the part of

mining enthusiasts. The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the lessor. No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required. Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transportng them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business. Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required. A plain and substantial disregard of this requirement constitutes a breach of the covenant for the exercise of reasonable diligence, which, as before shown, is also made a condition of the lease under consideration.

As the amended bill discloses that there was no breach of any condition during the 5-year period, and as the lessor will not be permitted to complain that the work of exploration and development is not proceeded with during the pendency of a suit in which she is seeking to have it adjudged that the right to proceed therewith was terminated before the suit was begun, the question of the lessee's diligence has reference only to the 14 months intervening between the expiration of the 5-year period and the declaration of forfeiture made by the lessor a few days prior to the beginning of the suit. The circumstances out of which the right to avoid the lease are alleged to have arisen are these: The land covered by the lease and owned by the lessor, omitting the tract sold, consisted of two tracts, separated by a distance of 8 miles and embracing 232.50 acres. Both tracts were within a recognized oil and gas field. The lessee had drilled one well on one of the tracts in which gas was found in paying quantity. No additional wells were drilled or attempted to be drilled during the 14 months. Many wells had been drilled in the territory adjacent to and surrounding these tracts which produced oil and gas in paying quantities, and new wells were being drilled and operated in that territory. The wells on adjacent lands were so near to these tracts that they drained the same of a good portion of the oil and gas therein and rendered the lease of much less value to the lessor than it would have been had the lessee proceeded with reasonable diligence to drill other wells on the two tracts and to operate them for the mutual benefit of the parties. The lessee took

and maintained the position that, by drilling the single well, it acquired the right to hold the lease indefinitely, without further development or doing more than paying annually the stipulated $50 for the gas from that well used off the premises. The extent of the drainage through wells on adjacent lands was not susceptible of definite ascertainment, and therefore the injury to the lessor from the lessee's failure to proceed with reasonable diligence could not be adequately compensated in damages. We think there can be no difference of opinion as to the effect of these allegations, all of which stand admitted by the demurrer. They show, not only an absence of reasonable diligence on the part of the lessee, but a practical repudiation of the controlling purpose of the lease and a persistent disregard of the rights of the lessor. The existence of gas in paying quantity in one of the tracts was an ascertained fact. Both oil and gas were being produced in paying quantities from the lands surrounding that tract and also from those surrounding the other. The consequent reduction of the underlying supply of these migratory minerals was operating to the serious disadvantage of the lessor. The necessary inference from what is stated is that further exploration and development would have been profitable to the lessee as well as beneficial to the lessor. In these circumstances the prolonged failure of the lessee to proceed with the contemplated operations, though due to a mistaken view of the obligations imposed by the lease, was a plain and substantial breach of the covenant and condition in respect of the exercise of reasonable diligence, and entitled the lessor to terminate the lease.

It is said the remedy of the lessor was not forfeiture, because the breach was compensable in damages. The claim is too broad. There is no general rule of law to that effect. Story's Equity Jurisprudence, §§ 1302, 1311. Relief against forfeitures is a distinctive doctrine of equity, and, save in special circumstances not shown to exist in this case, is never granted where the damages occasioned by the breach because of which the forfeiture is incurred cannot be ascertained with reasonable precision. Story's Equity Jurisprudence, §§ 450–454. Thus, in Sheets v. Selden, 7 Wall. 416, 421, 19 L. Ed. 166, where the forfeiture of a lease was under consideration, it was said:

"The grounds upon which a court of equity proceeds are that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain; and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced, if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign."

The covenant here broken was not in the nature of a pecuniary

obligation, such as a covenant to pay rent, nor was its breach reasonably compensable in damages. The amount of oil and gas which would have been produced from the lessor's land by the exercise of due diligence on the part of the lessee, as also the amount diverted therefrom by wells on surrounding lands, was not susceptible of anything like certain ascertainment. More than this, the attitude of the lessee was such that the breach promised to be a continuing one, and, by reason of the migratory character of oil and gas, to be as injurious to and as destructive of the lessor's rights as would be continuing trespass or waste. The forfeiture was, therefore, not one which equity would have relieved.

The forfeiture having been rightfully asserted under circumstances where the lessee was not entitled to relief in equity, the remaining question is: Can the lessor maintain a bill to establish the forfeiture as matter of record, and to cancel the lease as a cloud upon her title? It will be answered by considering whether "a plain, adequate, and complete remedy may be had at law." (Rev. St. § 723 [U. S. Comp. St. 1901, p. 583]), and also whether there is any insuperable objection in equity to granting relief which involves giving effect to a completed forfeiture. * * *

It follows from what has been said that, if the present case be regarded as in effect one to enforce a forfeiture, it is yet one the circumstances and exigency of which, as stated in the amended bill, entitle the lessor to relief in equity.

It has been said of a suit like this that it is not one to aid in the enforcement of a forfeiture. Harper v. Tidholm (Ill.) 40 N. E. 575; Mott v. Danville Seminary (Ill.) 21 N. E. 927; Pendill v. Union Mining Co. (Mich.) 31 N. W. 100. But we think it is essentially of that character. Its primary and only purpose is to establish a forfeiture as matter of record and to obtain the cancellation of the thing forfeited. This constitutes enforcement in the only sense in which that term is applicable to a forfeiture, which is that of giving effect to it after its incurrence, just as a statute is enforced after its enactment. The case of Big Six Development Co. v. Mitchell (C. C. A.) 138 Fed. 279, which seems to adopt the other view, differs from this in that there the primary purpose was to enjoin continuing trespass or waste. It follows that, under the rule before stated, the lessor will be entitled to relief only in the event that the case made upon the hearing shall be, as is that made by the amended bill, one the equity of which is strong enough to overcome the general indisposition of courts of chancery towards aiding in the enforcement of forfeitures.

The decree is reversed, with instructions to overrule the demurrer to the amended bill and to take such further proceedings as may not be inconsistent with the views expressed in this opinion.

PYLE ET AL. v. HENDERSON ET AL.

1909. SUPREME COURT OF APPEALS OF WEST VIRGINIA.
65 W. Va. 39, 63 S. E. 762.

BILL by C. E. Pyle and others against one Henderson and others. Decree for defendants, and complainants appeal. Affirmed.

BRANNON, J.[9]—Thomas Bunfill, February 3, 1897, made an oil lease of 60 acres of land to A. B. Campbell and J. W. Swan. The lessees paid Bunfill a cash bonus or consideration for the lease of $55. The lease is for a term of five years, and so long thereafter as oil and gas shall be found in paying quantities or rental paid thereon. The lease contained a clause on which this litigation turns: "Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine unless a well shall be completed on said premises within three months from the date hereof, or in lieu thereof thereafter the parties of the second part shall pay to the parties of the first part fifteen dollars for each three months' delay, payable in advance, until such well is completed." No well was put down under this lease, nor was the $15 commutation money paid. On May 5, 1897, Bunfill made an oil and gas lease of the same tract to C. E. Pyle. The contest is between those claiming under these conflicting leases. When the first lease was made, Bunfill owned only seven undivided ninths of the tract. His brother John owned one ninth, and the Sindledecker heirs the other ninth. Thomas Bunfill secured a conveyance from John Bunfill of his ninth, March 15, 1897, before the three months' limit in the clause quoted above had expired. He never did get in the ninth interest of the Sindledeckers. Some of them were infants, and under a judicial proceeding Miller, trustee, acquired that share of the oil and gas. Pyle, the second lessee, assigned an interest in his lease to Hardman, and Pyle and Hardman assigned the second lease to Miller, trustee, and thus Miller obtained the whole, except reserved royalties to Pyle and Hardman. The first lease came to be owned by Campbell, Swan, Stealy, and Henderson. No possession was taken under the first lease, but under the second wells were drilled and oil produced. Pyle, Hardman, and Miller, trustee, claiming under the second lease, brought a chancery suit against Henderson and others, claiming, in their original and amended bills, under the second lease as superior to the right of those claiming under the first lease; claiming that all right under it had ceased before the second lease was made, because of failure to drill a well or pay the $15 commutation money, as demanded by the clause of the first lease quoted above; alleging that they were in possession, operating for oil under the second lease; and seeking to enjoin the claimants under the

[9] Part of the opinion is omitted.

first lease from entering and boring for oil, and to cancel said first lease as a cloud upon their title. The defendants filed a cross-bill answer setting up their title under the first lease, and praying that the second lease be canceled. A decree was entered holding the second lease void and canceling it, and declaring the first lease good and valid, and dissolving an injunction which had been awarded against the claimants under the first lease entering or operating. The decree conceded to Miller his right to the Sindledecker share. From this decree Pyle and others appeal.

One argument made for the second lease is that the first has no covenants binding the lessees to do anything, unless they wished; that it binds the lessees for nothing until they should get oil either to drill a well or pay money; that the lessor could have no suit for money, or to compel operations of development of oil. It is thence contended that the contract wants the essential of a binding contract, namely, mutuality. Under this view the lessor could renounce or revoke the lease at any time, because if not binding the lessee for anything, neither would it bind the lessor, and hence the second lease would be an election by Bunfill not to be bound, and would confer good title. For this contention we are cited the case of Eclipse Oil Co. v. South Penn Co., 47 W. Va. 84, 34 S. E. 923, and Glasgow v. Chartiers Oil Co., 152 Pa. 48, 25 Atl. 232. We differentiate the present case from the Eclipse Case, from the fact that no money was paid as a bonus in that case, whereas one of $55 was paid for the lease in this case. We cannot see that when a lessee pays a money consideration for the right or privilege of boring for oil within a fixed time, and, in default of so doing, of paying money as an alternative, he has no vested right of exploration, but his privilege may be revoked at any moment, whether the limited time has expired or not. If that be the true view, the clause of cesser is needless, because no revocation could be made for want of mutuality only. It would seem to me that a lease of this character, the lessor receiving valuable consideration for the privilege of exploration for oil, would confer a valid right of exploration for the time and on the terms spoken of in it. Such would seem to be the intent of the parties and the justice of the matter, notwithstanding the contract imposed no obligation on the lessee to drill or pay. The lessor has been paid his price for giving such privilege. It seems that this was the construction of the Eclipse Case in the opinion by Judge McWhorter in Harness v. Eastern Oil Co., on page 250 of 49 W. Va., on page 670 of 38 S. E. Denying the aptness in that case of the Eclipse Case, he said: "In that case the lessee had paid nothing; had done nothing." In Lowther Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, Judge Dent, who prepared the opinion in the Eclipse Case, differed the two cases because of $1 paid as a bonus. That lease imposed no obligation on the lessee. In Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701, 104 Am.

St. Rep. 977, a point held is: "An option given for a valuable consideration cannot be revoked until the time limit thereon has expired. If such option is without consideration, it may be withdrawn or revoked at any time before acceptance." So we cannot say that from mere want of mutuality Bunfill could ignore the first lease.

The lessees under the first lease neither drilled a well within three months, nor paid the money in place of it stipulated in that lease. For the second lease it is contended that such failure of itself caused the death of that lease; that it would work this result without any act on the part of the lessor declaring a forfeiture, even had the second lease not been made; that Bunfill could have remained quiet, done nothing to manifest an intent to insist upon the death of the lease, and it would have come to its end absolutely from such failure alone; that the "paper is self-destructive." It is said the document contains no words calling for an act declaring a forfeiture to end it. The contention for the first lease is that an oil lease implies a warranty of good title, and as Bunfill did not have the Sindledecker ninth, the title was not good, and work of development could not be safely done, and he could not insist on a forfeiture. Counsel for the second lease say that there is no place for forfeiture, as the first lease was at an end. So much is this so that the end of the lease, its death from want of compliance with its terms, could not be waived, and that the second lease could have no effect as a declaration or act of forfeiture. That the land had been already freed from the first lease, without the second lease. That nothing but a new lease to the first lessees would do. Those claiming under the first lease say that, as Bunfill's title was defective, and as he agreed to an extension of time for boring a well or paying money in its place, as below stated, he could not enforce a forfeiture; that Bunfill was in no condition to enforce a forfeiture. The other side says that it cannot be held that Bunfill was in no condition to declare a forfeiture as there was no forfeiture to be declared, because the lease was dead. This distinction is quite refined and unpractical. What if the intsrument does not in terms provide for a forfeiture and contain the word? What [is] the plain meaning of the clause that for failure to drill or pay money the lease "shall become null and void and all rights thereunder shall cease and determine"? The clause was put there for the benefit of the lessor. Another clause, one giving right to the lessee to surrender and be discharged from liability, covered his case. Surely the lessor could waive this clause made for his protection. It cannot be asserted that there is anything in this clause as written preventing Bunfill from dispensing with it. That a forfeiture may be waived by the landlord in favor of a tenant is reasonable and clear from cases cited in Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151. See Roberts v. Bettman, 45 W. Va. 143, 30 S. E. 95.

The great question is, Was Bunfill, under the circumstances of

defective title and waiver of forfeiture upon the facts to be stated below, in a condition, on principles favored in equity, to make the second lease, and thus declare a forfeiture and divest the right of the first lessees? The circuit court's finding is that Bunfill was not. This finding is upon much oral evidence and conflicting, and we cannot reverse, unless we can say that such finding is plainly wrong. We cannot say so. That Bunfill's title was bad no one disputes and he himself admitted it. He did not disclose its defects to the first lessees, but represented to them that it was good, and leased the whole tract. Some time after the first lease was made, before the three months had gone, Campbell and Swan went to Bunfill and told him of the fact that he did not own two-ninths of the tract. He confessed the fact. They told him he must secure them. He agreed to do so. He made two trips to Ohio to get in these two-ninths at their request. He agreed to hunt up the Sindledecker heirs and secure in some way their interest. The lessees furnished him money to pay traveling expenses and purchase. He went to Wellsville, Ohio, to get information of them. He learned that they resided, some in Taylor county, others in Cumberland. On his return from Wellsville he informed his lessees where they were to be found, and it was agreed between him and Campbell and Swan that Campbell and Swan should go to those heirs and arrange for securing their title, and Campbell went, and while absent on this mission Bunfill made the second lease, without notice to the first lessees. It was distinctly agreed that Bunfill should, at his expense, procure this outstanding right, and that the cost should go to the credit of the lessees on the money payable under the lease on commutation of drilling. The lessees contributed to get a deed from John Bunfill for his interest. All this is inconsistent with the idea that Bunfill intended to rely on the strict letter of the forfeiture clause. Perhaps, if he had not agreed to get in the title, and joined with his lessees to do so, and undertaken efforts to do so, and agreed to credit the cost on the rental, his second lease would be good; perhaps mere badness of title would not have stayed the lapse of the lease, but when we reflect that the title was bad, and that Bunfill admitted it to be bad, and agreed to join in the effort to perfect it, and agreed that the cost should go on the commutation money, and the amount of the expenditure not being known, and no time being limited to Campbell and Swan to carry out the right given them to get in the Sindledecker share, and the Sindledecker heirs being infants, necessitating resort to court proceedings, and these lessees were actually going on to secure these interests within reasonable time, we must conclude that Bunfill thus dispensed with payment of the $15 payable at the close of the three months, and thus waived the forfeiture and extended the time. "Where in an oil lease there is a clause of forfeiture, for nonpayment of rental, but the lessor consents that it need not be paid at the

times when due, and indulges the lessee and acquiesces in his failure to pay, there is no forfeiture for nonpayment." "In case of such a lease, if the lessor by his conduct clearly indicates that payment will not be demanded when due, and thus lulls the lessee into a feeling of security and throws him off his guard, and because of this he does not make payments when due, the landlord cannot suddenly, without demand or notice, declare a forfeiture, and there is no forfeiture which equity would recognize, and, if there is in such case technically a forfeiture at law, equity would relieve against it." Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151. "A forfeiture will be deemed waived by any agreement, declaration, or course of action on the part of him who is benefited by such forfeiture, which leads the other party to believe that by conforming thereto the forfeiture will not be incurred." Hudson v. N. Pacific Ry. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550. And we must not forget that this case is in a court of equity, which frowns upon forfeitures as heavy and harsh, and will never enforce them, but will generally relieve against them. This suit is to enforce a forfeiture. It must do so if relief is granted the second over the first lease. Spies v. Arvondale, 60 W. Va. 389, 55 S. E. 464; South Penn. Co. v. Edgell, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43; Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499; Pheasant v. Kannah, 60 S. E. 618. A full discussion of this subject is in 8 Am. & Eng. Dec., in Eq. 180 and notes. We find there the following: "A court of equity will leave to his remedy at law—will refuse to interfere to grant any relief to—one who, in the matter or transaction concerning which he seeks its aid, has been guilty of bad, unrighteous dealing, or unconscionable acts." "Courts of equity will not entertain bills to enforce forfeitures, but leave the parties to their remedies at law."

It is contended that the lessees under the first lease could have drilled for oil by right of being cotenants of the Sindledecker heirs, and were bound to do so. It would be waste by law, and a wrong by our statute. Code 1899, c. 92, § 2 (Code 1906, § 3390); 30 Am. & Eng. Ency. L. (2d Ed.) 265. It has several times been held in this state that one tenant in common cannot commit waste by extracting oil. Williamson v. Jones,[10] 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Cecil v. Clark, 49 W. Va. 459, 39 S. E. 202. Chancellor Kent held that injunction will go to stay waste "between tenants in common, where the waste is destructive to the estate, and not within the usual and legitimate exercise of the enjoyment." Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 132. It changes the whole character of the inheritance. The Sindledeckers owned the corpus in fee. They could sue or enjoin for waste. In the Williamson Case Jones had interests in the corpus, and it was

[10] See Williamson v. Jones, post, p. 737.

held he could not take oil. High, Inj. § 692. As a principle of law applicable to cases in general, I am reluctant to say that in every case an injunction will lie for one tenant against his cotenant cutting timber, taking coal or oil. The authorities are divided. But we must remember that we have that statute. In some cases he may be required to resort to an action for his share. But there is a high authority for the proposition. 5 Pomeroy's Eq., in 1 Equitable Rem., § 492, says: "It was formerly thought that, because of the nature of their legal rights, an injunction would not issue between tenants in common for any ordinary act of waste, either legal or equitatble, but that acts of waste so destructive as to go beyond the requisites of either of these might be enjoined. But the cases show that the exercise of equity jurisdiction is now more liberal, and any acts of waste by one tenant in common that are inconsistent with prudent management of the estate, or that jeopardize the interest of his co-tenants, will be enjoined." Pomeroy cites Hawley v. Clowes, above, Woods v. Early, 95 Va. 307, 28 S. E. 374, and many other cases. And, even if the lessees might have drilled, were they bound to do so, and subject themselves to an action for account for the share of the Sindledecker heirs? Likely owners of a mine, or lease to mine, one may mine. That is the nature of the property; but in this case the lessees had an oil lease, good only for a part of the estate. The Sindledeckers owned the corpus of the ninth. These lessees, and they were not co-tenants, so as to give the lessees right to take oil. They did not hold with Campbell and Swan a joint estate under the lease. One co-tenant can make a lease binding another. Could not the Sindledeckers have enjoined the first lessees from drilling? In this connection it is argued that the majority may control, and therefore the lessees having a lease from the owner of a majority of the undivided interests could drill. They are said to be a mining partnership, subject to the control of a majority. That is so where the work has been entered upon. But this is not a case of a mining partnership. Were the lessees under the first lease mining partners with the Sindledeckers? They were not in any sense. But I ask, what if the first lessees could have entered? How does this question materialize in view of the fact that Bunfill dispensed with drilling or paying, extended the time, until the Sindledecker right should be procured? When Pyle took the second lease, he had full knowledge of the first lease, and solicited Bunfill to lease to him. A court of equity cannot look with much favor on his suit to enforce a forfeiture to his benefit.

When this second lease was taken, the term of the first lease, five years, had not expired. If it had, there would be some force in saying that it could be extended only by a new lease; but such was not the case. It was then competent for Bunfill to waive the mere forfeiture; the first lease being still in life. From want of title and

waiver of payment by Bunfill, it was the binding duty of Pyle to learn, by inquiry from the first lessees, as to the right they claimed, and how they claimed, and we may say that he would have learned that Bunfill had agreed to procure good title for the benefit of the first lessees, and had waived the forfeiture. Knowledge of the first lease put Pyle on inquiry, and he is affected with notice of the right of the first lessees and the waiver of the forfeiture. Authorities for this proposition are given in Reed v. Bachman, 61 W. Va. at page 464, 57 S. E. at page 774. Pyle was thus under the law guilty of gross negligence, to say the least. It is said that when Campbell and Swan took the first lease they knew of the outstanding titles. They deny it. Perhaps they had constructive notice. What if they had actual notice? They had a warranty against it, since an oil lease implies a warranty for quiet enjoyment. Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744. If a man have knowledge of a lien or defect of title, yet takes a general warranty, he can rely on the warranty.

Another point made for the second lease is that a tenant cannot, while in possession, attack his landlord's title, but must give up possession before he can do so. This rule has no application in this case. Campbell and Swan never took possession. There was no possession to give up. A tenant in possession cannot defeat his landlord's title, and disavow the tenancy, by setting up a hostile title; but this principle is not fitted to this case. The lessees do not say that their landlord's title is bad as to those interests which he owned. They only say that he leased all the tract, as if no other person had an interest, when in fact another had such interest. This is a case between landlord and tenant, growing out of the relation under the lease. A tenant is not bound to pay rent when he gets bad, defective title. It involves the question as to this point, whether when the landlord's title is defective, the tenant shall forfeit his right by failure to drill or pay rental. * * *

Our conclusion is to affirm the decree of the circuit court.

EASTERN OIL CO. v. COULEHAN ET AL.

1909. SUPREME COURT OF APPEALS OF WEST VIRGINIA.
65 W. Va. 531, 64 S. E. 836.

BILL by the Eastern Oil Company against John C. Coulehan and others. Decree for defendants and complainant appeals. Reversed and rendered.

MILLER, P.[11]—August 3, 1901, defendant and wife executed and delivered to West Union Gas Company a lease, which on the same

[11] Part of the opinion is omitted.

day it assigned to plaintiff, and whereby, in consideration of $250 and other valuable considerations, the said lessors granted and demised unto said lessee all the oil and gas in and under a tract of 118 acres in Doddridge county, and also said tract of land for the purpose and exclusive right of operating thereon for oil and gas, together with other rights usually appertaining to such leases, and containing this habendum: "To have and to hold the same unto the lessee for the term of five years from this date, and as much longer as oil or gas is produced, or the rental paid thereon." The lease also stipulates: That the lessor shall be paid a royalty of one-eighth part of all the oil produced and saved, and thereafter at the rate of $200 yearly for each gas well as long as gas therefrom is sold, payable within 60 days after connecting to use gas therefrom; the lessor to have gas for his dwelling from any gas well free by making connections, and, in case no well shall be completed within three months from the date thereof, the same to become absolutely void and of no further effect whatever on either party, unless the lessee shall pay for further continuances of the privileges therein mentioned the sum of $50 quarterly, payable in advance until a well shall be completed. That the lessee may at any time reconvey the premises "thereby granted" and thereupon be forever discharged from all liability to the lessors under any and every provision thereof accruing after such reconveyance and the instrument be no longer binding on either party. In Ohio a lease of this character, for a consideration, with granting clause, a habendum, a condition subsequent or defeasance clause, and a surrendering clause, is held to be a lease and not merely a license. Brown v. Fowler, 65 Ohio St. 507, 521, 63 N. E. 76, citing Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62, and Martin v. Jones, 62 Ohio St. 519, 525, 57 N. E. 238. In this state and in Pennsylvania such leases are generally treated as mere licenses vesting no estate; the title thereto, both as to the period of years and the term thereafter, remaining inchoate and contingent on the finding of oil and gas. Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220; Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744.

The plaintiff, having paid the cash consideration, entered, and regularly paid the quarter annual installments of rent in advance for the full period of five years, but did not begin the work of drilling for oil or gas until June, 1906, after the last quarter had begun. It owned other leases adjoining and in the same neighborhood, on some of which it had put down wells, the wells drilled, defining defendant's land as gas, but not oil, producing territory. We take judicial notice that gas, unlike oil, cannot be brought to the surface and stored to await a market for it, but must remain in nature's storehouse, and, unless allowed to waste away, taken out only as and when the producer may be able to find customers to take and consume it.

Plaintiff, having then invested in bonus money and rentals $1,200, in June, 1906, began a well on defendant's land, and about July 20th struck gas in the salt sand at the depth of about 1,240 feet, which, when gauged and tested, showed a capacity of about 3,000,000 cubic feet per day. After striking this gas, however, he concluded to go deeper, to the lower or Indian sand. The well was begun in ample time to have completed it in the lower sand, but shortage of water, due to the drought, caused a delay of several days. Finding the time growing short, the defendant declining to extend the term except upon terms deemed oppressive, orders were given the drillers to work on Sunday. The defendant seeing the drillers at work suggested that they were laying themselves liable to arrest and conviction for working on Sunday, and they were frightened away and refused to work. Thirty minutes, about, after midnight of August 2, 1906, defendant, with witnesses, appeared at the well, where the drillers were at work on the night tower, and, inquiring of and being informed by them that the well was not yet completed in the lower sand, notified them that the lease had expired at midnight, that the rights of lessee had ceased, and that all from that time would be treated as trespassers. The drillers, in the absence of the owners, stopped drilling, went home, and went to bed, and work was not resumed until noon of August 3d, a loss of about 12 hours in time. The drilling then begun was continued until shortly before 1 o'clock of August 4th, when gas in immense quantities was struck in the Indian sand; the only interruption being the second appearance of the defendant with witnesses shortly after the previous midnight to again notify the drillers that the lease had then expired and ordering them off the premises. The plaintiff having refused to vacate the premises, the defendant on August 4, 1906, instituted against the plaintiff in the circuit court of Doddridge county a suit in unlawful detainer to recover possession of the property.

On December 8, 1906, the plaintiff upon its original bill obtained from said circuit court of Doddridge county an injunction protecting it in the possession and occupancy of said land, and enjoining defendant from in any manner interfering with any of its rights specified in said lease of August 3, 1901, and from in any manner interfering with it in the use, occupancy, and operation of said land for oil and gas purposes under said lease, and also from prosecuting his said action of unlawful detainer until plaintiff's rights under said lease should be settled and determined in this suit, and until the further order of the court. The further prayer of the bill was on the grounds alleged that the court would decree plaintiff vested with the title to and interest in all the oil and gas according to and subject to the terms of said lease, and that the said lease be held firm and valid. At January rules, 1907, the plaintiff filed an amended bill amplifying the grounds of relief alleged in the original bill, renewing the prayer thereof, and upon hearing upon said original and amended bill and

the separate answer of John C. Coulehan thereto, and upon the depositions and proofs taken and filed in the cause, the decree of September 7, 1907, appealed from, was pronounced by the circuit court, whereby the court, being of the opinion that the evidence did not sustain the material grounds for relief alleged, decreed that said injunction be wholly dissolved, the plaintiff's original and amended bills dismissed, but, though expressing no opinion as to the production of gas in the salt sand, reserved to plaintiff the right to interpose the same as a defense to said action of unlawful detainer.

The grounds for relief alleged and especially relied upon by plaintiff are: (1) That having, for the consideration paid and acknowledged, purchased the lease, promptly paid all the bonus and rental money for the full term of five years, and within that period having actually discovered and produced gas in the salt sand, it thereby acquired a vested estate in and the right to produce oil and gas according to the provision of the lease. (2) That whether or not the first ground be good it could, and but for the alleged improper conduct and interference of defendant it would, have discovered and produced gas in the Indian sand before the five years expired.

The defendant relies upon the theories: (1) That even if oil and gas was discovered in the salt sand in July, it was not utilized, but abandoned, evidenced by drilling deeper, pulling the casing, whereby it was drowned out by the water, and defendant thereby deprived of the use of the gas therefrom for domestic purposes according to the terms of the lease. (2) That by the provision of the lease the term of five years expired at midnight of August 2d, and not as plaintiff claims at midnight of August 3, 1906, and that there was no such interference on his part with the completion of the well in the Indian sand within the five years, as claimed by him, as to entitle plaintiff at law or in equity to an extension of time, and that therefore the rights of plaintiff under the lease were wholly terminated at midnight of August 2d, if not then certainly at midnight of August 3d. (3) That equity has no jurisdiction of the subject-matter of plaintiff's bill.

By its decree the court below was manifestly of the opinion that the bill presented no grounds of equitable relief, and that whatever rights, if any, plaintiff acquired by its alleged discovery of gas within the five years, was available at law as a defense to defendant's suit of unlawful detainer, wherefore its reservation in the said decree. If plaintiff's rights depended solely on the discovery of gas in the first sand, there would be force in this view of the court, although jurisdiction in equity to settle all questions as to the validity and priority of leases, for oil and gas and other minerals and mineral rights, where the parties claim under the same title, has been established by a long line of decisions of this court, beginning perhaps with Thomas v. Hukill, 34 W. Va. 385, 12 S. E. 522; and including Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222,

Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566, Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220, Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, Lowther Oil Co. v. Miller-Sibley Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027, Pyle v. Henderson, 55 W. Va. 122, 46 S. E. 791, Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179, and other cases, and ending with Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307, and Pheasant v. Hanna, 63 W. Va. 613, 60 S. E. 618. Jurisdiction in equity was maintained in many of these cases on the well-recognized ground of avoidance of multiplicity of suits, removal of cloud and quieting of title, accounting, avoidance of forfeiture, and specific execution of contracts. And it has been held by this court in Kilcoyne v. Oil Co., 61 W. Va. 538, 56 S. E. 888, Knotts v. McGregor, 47 W. Va. 566, 35 S. E. 899, and Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744, that the covenant for peaceable and quiet possession implied in every lease for oil and gas is not limited to the right of exploration, but extends also to the right, after finding oil or gas, to produce the same, and that injunction is the proper remedy for enforcement of such covenant or to protect the exclusive right of the lessee under the contract. Transportation Co. v. Pipe Line Co., 22 W. Va. 621, 46 Am. Rep. 527; Tufts v. Copen, 37 W. Va. 623, 16 S. E. 793; Brown v. Spilman, 155 U. S. 673, 15 Sup. Ct. 245, 39 L. Ed. 304. In Pennsylvania we find that it has been held that a preliminary injunction will be awarded against a lessor where he has made a re-entry under a claim of forfeiture and the claim is disputed on every ground on which he puts it. Thornton on Oil & Gas, 120, citing Poterie Gas Co. v. Poterie, 153 Pa. 10, 25 Atl. 1107, and Duffield v. Rosenzweig, 144 Pa. 520, 23 Atl. 4. The doctrine of these cases on the subject of equitable jurisdiction has never, we believe, been questioned in this court, except that in Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895, the first point of the syllabus of Bettman v. Harness, supra, so far as it relates to the jurisdiction to settle the title and boundary of lands as between adverse claimants, when the plaintiff has no equity against the party who claims adversely to him, was overruled.

But as we view this case the rights of the plaintiff are not wholly dependent on the discovery of gas in the salt sand. The fact of such discovery within the meaning of the lease is controverted. The question whether the gas in that sand was not abandoned and the rights of the plaintiff, if any, lost thereby, are raised here, and no doubt would be raised in the trial of the action at law, so that if the plaintiff has any other rights of an equitable nature to assert against the defendant of which a court of equity can take cognizance, or its defense at law would not be as complete, adequate, and certain as in a court of equity it should not be required to relinquish its equitable rights. Hogg's Equity Proc. § 3, and state and federal cases cited;

Eaton on Equity, 31, and cases cited. As the court said in Nease v. Insurance Co., 32 W. Va. 283, 9 S. E. 233: "A doubtful or partial remedy at law does not exclude the injured party from relief in equity." And in Robinson v. Braiden, 44 W. Va. 183, 28 S. E. 798: "A defendant at law, having a legal defense to the action and a distinct ground for equitable relief against the plaintiff's claim, may bring his suit in equity without waiting for the determination of the action at law, and may, without being compelled to waive his legal defense by confessing judgment, have a hearing in the court of equity on the merits of his case and a decree for the proper relief." These cases were affirmed in Gas Co. v. Window Glass Co., 63 W. Va. 266, 61 S. E. 329. Equity retains its jurisdiction to relieve from a forfeiture notwithstanding it may be relieved at law. Hogg's Equity Proc. § 587, p. 678, citing 2 Story, Equity Jur. (4th Ed.) § 1301. Indeed, this is such a well-recognized rule that it requires no citation of authority to sustain it.

One of the questions presented, but particularly applicable to the rights of the plaintiff involved in the discovery of gas in the second sand, but somewhat apropos also to the discovery of gas in the salt sand is: When did the five-year term expire? * * * Our conclusion, based on our statute and these authorities, is that, where a contract of lease of the character of that involved here requires of the lessee affirmative acts to be done within a certain period stipulated from the date thereof, unless there is something in the instrument itself evincing a different intention on the part of the parties thereto, the date of the instrument will be excluded in the computation of time.

But it is claimed that the receipts taken by plaintiff for the quarterly installments of rent show a different construction by the parties, which should prevail. We do not think so. The rule invoked is applicable only when the words of the instrument are ambiguous.

Now as to the two main questions: First, was gas discovered in the salt sand, and, if so, did the plaintiff thereby become vested with an estate in the right to produce oil and gas, which has not been lost by abandonment or otherwise? It is not controverted that gas in some quantity was struck in this sand; but an effort was made, and some evidence offered, tending to show that it was not of sufficient quantity for profitable production, and it is claimed the plaintiff by going on down with same well to deeper sand, and by subsequently pulling the casing and allowing the water to come in and flood out the gas in the first sand, must be treated as having abandoned the gas in that sand, and therefore as not having acquired any vested right to produce gas from it or from the lower sand. But the positive evidence of the drillers and others, tested by the gauge, is that gas sufficient for profitable production was obtained in this first sand, and plaintiff denies any intention to abandon it, claiming that in going to the deeper rock its intention was to also test the land for

oil and gas in that sand. Our cases seem to clearly hold that discovery of oil or gas is alone sufficient to vest the right—a right, it is true, which may be lost by abandonment, manifested by neglect to produce, or pursue the work of production and further development. Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101; Lowther Oil Co. v. Miller-Sibley Co., 53 W. Va. 505, 44 S. E. 433, 97 Am. St. Rep. 1027; Oil Co. v. Gas Co., 51 W. Va. 583, 591, 42 S. E. 655, 59 L. R. A. 566. See, also, Thornton on Oil & Gas, §§ 53, 70, and cases cited. In Oil Co. v. Gas Co., supra, at page 591 of 51 W. Va., at page 658 of 42 S. E. (59 L. R. A. 566), it is said: "After the discovery of oil in paying quantities, it is held that title does vest in the lessee; but there is no case which goes so far as to announce that, after mere discovery of oil, the lessee, upon the assumption of a vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease, and simply hold it for speculative purposes, or to await his own pleasure as to the time of development."

But what of the fact here? After discovery of gas in the first sand, the lessee went right on down, with the same hole, it is true, succeeding thereby in finding greater quantities of gas in the lower strata, and rendering the defendants' land and its lease still more valuable. We have no case directly holding that, where, oil or gas has not been first produced from the rock in which they are first found, there is no abandonment by going deeper for the product in some lower strata; but we have a case, where a well had ceased to produce oil in the first sand, saying: "No one can claim that under such lease, if the lessee go on in further exploration, his right is lost. He may go on in a reasonable time." Ammons v. Toothman, 59 W. Va. 165, 169, 53 S. E. 13, 115 Am. St. Rep. 908. We would have to say on the weight of the evidence that gas was found by plaintiff in the first sand, in sufficient quantities to vest in it the right to produce oil or gas from said land, and that there was no intention to abandon that right by going deeper with the same well to the lower rock. Having discovered gas in the first sand, and almost immediately thereafter in larger quantities in the lower sand, what was to preclude plaintiff from returning to the first sand, and either from the same well, or from a new well drilled, again tapping that reservoir, discovered by it, and producing gas also from it? Of course, if gas had not been found in the lower rock, on the principle announced in the case last cited, production of gas from the first sand, after discovery, could not long be deferred, without incurring the penalty of forfeiture or abandonment.

But suppose we are wrong in our conclusion on the first question, what rights, if any, did the plaintiff acquire by the slightly belated discovery of gas in the Indian sand? It is conceded the Indian sand was not penetrated and the gas gotten there until about 1 o'clock of

August 4th, some 12 hours after the 5 years had expired. What is the proper construction of the lease as to time? It is for five years from date and as much longer as oil or gas is produced or the rental paid thereon. If oil or gas was produced within the five years given for exploration, the full term thereof was as surely for as much longer as oil or gas should be produced, as it was for the term of five years in which to explore. Failure to produce oil or gas within that time therefore, while not strictly or technically working a forfeiture of any further right to explore or produce oil or gas, resulted in the same thing to plaintiff, and we perceive no reason why in a proper case equitable principles applicable in cases of technical forfeiture should not be applied. The same necessity therefor, in order to prevent a gross injustice, may arise in the one case as in the other. It is said, however, that in contracts of this kind time is of the essence thereof, and this proposition, for which authorities are cited by counsel, is not controverted; but the case we have in hand is one where the plaintiff was legally entitled to the full term of five years given for exploration, without let or hindrances of the lessor. Indeed, the lessee by the implied covenants of his deed was entitled to the protection of the lessor therein. The evidence satisfies us that, though defendant may not have been guilty of serious breach of the implied covenants of his deed, yet that he was anxious the lessee should fail to get to the Indian sand in time, did nothing to aid him, and actually succeeded by his suggestions in preventing work on Sunday, and caused a loss of about 12 hours' time after midnight of August 2d, when he had no right of interference, but owed a positive duty to plaintiff to protect it in its rights. The drillers Kenney and Gaffney give it as their opinion that had they not been thus interrupted the well could have been drilled into the Indian sand and gas produced from it before the time expired.

Do these facts and circumstances give rise to no equitable rights against defendant? Shall he be permitted to take advantage of his own wrong in this way? And if he had not so interfered and the well could not have been drilled in within the time, are there no principles available to a court of equity upon which the plaintiff can be relieved from the gross injustice which the defendant seeks to inflict upon it? The plaintiff was acting in good faith, had invested large sums of money. The plaintiff lost nothing, but he got the benefit of the successful search, and wherein has he been wronged? Defendant's counsel cite us to Thornton on Oil & Gas, § 141, for the proposition that, "although a well be commenced in time, if it be not completed in time the lease will terminate." For this Thornton cites Cleminger v. Baden, 159 Pa. 16, 28 Atl. 293, a case in which, though the well was commenced in time, there was no intention to complete it in time. It was not begun in good faith, and it was very properly held the beginning of the well did not prevent a forfeiture. The other cases cited are of the same character, and are not, we

think, in conflict with the conclusion we have reached in this case. A lessor should not be heard to complain of a default caused by himself, or permitted to take advantage of his own wrong. Delmar Oil Co. v. Bartlett, 62 W. Va. 700, 59 S. E. 634; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; Stahl v. Van Vleck, 53 Ohio St. 136, 41 N. E. 35; Hukill v. Guffey, 37 W. Va. 426, 16 S. E. 544.

We perceive that, upon the facts shown, the plaintiff is entitled to relief by injunction upon at least two well-recognized grounds of equitable jurisdiction: First, upon the principle applicable in cases calling for relief from a forfeiture; second, upon the ground that where there has been a substantial compliance with the contract, and gross injustice would be inflicted upon the plaintiff by denying him relief, relief should be granted. As we have said, the case in hand does not, strictly speaking, involve forfeiture, but is one, we think, calling for the application of the same principles. The reasons therefor are the same in both cases. "The reason of the law is the life of the law." "Affirmative relief against penalties and forfeitures," as was said by this court in Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363, "was one of the springs or fountains of equity jurisdiction, and the jurisdiction was very early exercised; and it would be going in the very opposite direction and acting contrary to its very essential principles to affirmatively enforce a forfeiture," citing Story, Pomeroy, and Bishop on this subject. Unless the delinquency has been willful, the court has discretionary power in relation thereto. Railroad Co. v. Triadelphia, 58 W. Va. 516, 52 S. E. 499, citing Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657, and other cases. In Pheasant v. Hanna, supra, jurisdiction in equity was upheld to relieve a mining lessee from a mere technical forfeiture.

Now on the subject of substantial performance of the contract: There can certainly be no question as to the fact that the plaintiff substantially performed its contract. It had discovered gas in one sand, and was about to find it in a lower sand in still greater quantities, and we cannot say from the evidence that, but for the improper interference by the defendant with its operation, it would not have discovered the gas in the lower sand within the term of five years. Where there has been such substantial performance of a contract, equity may set aside or disregard a forfeiture occasioned by a failure to comply with the very letter of an agreement. 1 Pomeroy, § 451, p. 756, citing Hagar v. Buck, 44 Vt. 285, 5 Am. Rep. 368, and Bliley v. Wheeler, 5 Colo. App. 287, 38 Pac. 603. And this court in Railroad Co. v. Triadelphia, page 517 of 58 W. Va., page 511 of 52 S. E., recognizes the doctrine announced in Henry v. Tupper, 29 Vt. 358, opinion by Chief Justice Redfield, that relief may be granted in equity even where the condition is for the performance of collateral acts.

For the reasons given we think the plaintiff has made out a case

entitling it to relief in equity, and the decree which the circuit court should have entered will be entered here, making perpetual the injunction awarded upon the original and prayed for therein and in the amended bill, and that the plaintiff have its costs in this court and in the circuit court in this behalf expended.

McGRAW OIL & GAS CO. ET AL. v. KENNEDY ET AL.

1909. SUPREME COURT OF APPEALS OF WEST VIRGINIA.
65 W. Va. 595, 64 S. E. 1027.

THE McGraw Oil & Gas Company filed a bill against R. W. Kennedy and the Crystal Ice Company, and thereafter Kennedy and the ice company filed a bill against the McGraw Oil & Gas Company, the South Penn Oil Company, and another. The cases were heard together and from the decree the Crystal Ice Company, Kennedy, and the South Penn Oil Company appeal. Reversed and remanded.

BRANNON, J.[12]—Hugh Evans, on September 20, 1899, leased a tract of 528 acres of land in Taylor county to U. S. Ditman and J. C. Gawthrop for production of oil and gas. The lease provided that Evans have free of charge gas for use in his residence; the lease to continue for the term of five years "and so long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, heirs, executors, administrators or assigns." The lease deed provided that the lessee deliver into pipe line to the credit of Evans one eighth of oil produced and pay $200 yearly for "each gas well the product from which is marketed and used off the premises." * * * Ditman and Gawthrop assigned the lease to the South Penn Oil Company. Later the South Penn Company assigned the estate in the gas to the Hope Natural Gas Company, reserving the estate in the oil. Later the Hope Natural Gas Company assigned the gas right to R. W. Kennedy to hold in trust for the Crystal Ice Company, a corporation engaged in manufacturing ice in the city of Grafton. * * * On March 20, 1907, Evans leased the same tract to the McGraw Oil & Gas Company. The latter company had full notice of the first lease, when it leased, and notice was served on it by Kennedy of his claim of title, and warning the McGraw Oil & Gas Company and John T. McGraw not to go on the premises, and warning them that, if they should produce oil or gas on the land, Kennedy would claim for the same. Notwithstanding this notice, the McGraw Company entered and drilled a well producing gas. * * *

It cannot be said that the first lease is forfeited by any express forfeiture clause found in it. The theory of the McGraw Company

[12] Parts of the opinion are omitted.

is that such a lease confers no vested estate in oil or gas in the earth, but at most confers only a right to search for oil and gas, and that only when oil or gas shall be found in paying quantity and marketed does any estate vest in the lessee, and that no estate ever vested under the first lease, because the gas found was not in paying quantity. This lease does not limit its term by requiring that oil or gas shall be found in paying quantity, as leases usually do. It says that the lease shall endure "five years from this date and as long thereafter as oil and gas, or either of them, is produced therefrom by the party of the second part." So this lease contains nothing in terms allowing the lessor to end it because oil or gas is not found in paying quantity; and, if there were such provision, I should regard it as made in the interest of the lessee to protect him from payment of the annual sum for a gas well, if insufficient in quantity, and not as intended to give the lessor right to terminate the lease against the lessee's will, he treating the quantity as sufficient and electing to pay. What right has Evans to say that no estate vested by reason of insufficiency of gas, when the lease makes no such provision, and the lessee chooses to regard it as sufficient and pay as if it were? And again it has been held, even when such a clause is in the lease, that it is with the lessee to say whether the product is in paying quantity. Urpman v. Lowther Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Thornton Petroleum & Gas, § 119. So held in Summerville v. Apollo Gas Co., 207 Pa. 334, 56 Atl. 876, and by Judge Goff in Kellar v. Craig, 126 Fed. 630, 61 C. C. A. 366; Young v. Oil Co., 194 Pa. 243, 45 Atl. 121, is notable for this construction of such a clause. It says that the operator has election to say whether it will pay. It is useless to argue that a lease does not vest right to oil and gas in place, and therefore no right vests of any character, if the quantity is too small to pay. No one says that the lease carries title to these minerals, even after a paying well has revealed them; but an estate, a right of value then vests, that is, right to retain possession of the land for operation and to go on to sever the minerals from the land and convert them into personalty. When this well was found, the lessee had right, if he chose, to keep possession and pay the annual rental. He had a vested right. Evans was only entitled to the rental. Title vested. He gets the same pay as if the well produced a larger quantity. There is really no evidence that it was not a paying well. The cross-bill alleges that it was, and this is to be taken as true on demurrer. Evans for seven years so treated it, for he received seven annuals of $200, knowing that the gas was not being marketed, knowing the status of the well. Though the gas was not marketed, the well was being used to comply with the lessee's covenant to furnish Evans gas for his use. The law is that "the right to declare a forfeiture must be distinctly reserved, proof of the happening of the event on which the right is to be exercised must be clear, and the party entitled to do so must exer-

cise his right promptly." Thompson v. Christie, 138 Pa. 230, 20 Atl. 934, 11 L. R. A. 236. Will equity allow Evans to wait and wait, drawing large sums of money yearly, and then at the eleventh hour suddenly forfeit? Is he not estopped? Such acceptance of money by Evans, knowing all the facts, is forcible against him as an estoppel in a court of equity. Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151. * * * Moreover, there is evidence going to show that the gas was, in fact, in paying quantity.

Title having vested, the lease contains no clause that forfeits it. It is argued not definitely, but virtually, that failure to drill other wells forfeits. We have frequently held that, where there is no express provision requiring additional wells, but only an implied one, this will not forfeit. Core v. Petroleum Co., 52 W. Va. 276, 43 S. E. 128; Kellar v. Craig, 126 Fed. 630, 61 C. C. A. 366. I have never been reconciled to the doctrine that for failure to drill additional wells the lessor must sue at law for damages, and equity will not cancel unless for draining from nearby territory, and thus exhaust oil in the leasehold involved. I have asked: How many actions must the landlord bring? How can damages be measured? How can we see into the depth of the earth? But it has been so held. The reason is that equity will not, as a rule, enforce a forfeiture of an estate. It will not especially insert such a clause when the parties have not inserted it, especially when they did insert forfeiture for failure to drill or pay commutation, but did not insert forfeiture for failure to drill additional wells. As to duty to drill additional wells for gas, the Pennsylvania Supreme Court has held, practically, that it does not exist in gas as in case of oil, because of the difference. A small oil well can be used; a gas well of slight pressure will not enter a gas line. McKnight v. Manufacturers' Gas Co., 146 Pa. 185, 23 Atl. 164, 28 Am. St. Rep. 790. That was for both oil and gas, but development seemed to show the section to be gas territory, as in this case; but we express no opinion as to this. We only say there can be no forfeiture for mere failure to drill more wells.

It is argued that failure to market the gas forfeits the lease. So it was claimed in Summerville v. Apollo Gas Co., 207 Pa. 334, 56 Atl. 876, as to a lease for two years "and as much longer as oil and gas are found in paying quantities," and the court said that the lessor had no right to forfeit at the end of two years because during that time no oil or gas had been marketed. "It may be that for some time the lessee was not able to find a purchaser for the gas, but that was not the affair of the lessors. They were not interested in the proceeds of the sale of the gas. Their rights under the agreement extended only to the receipt of a stipulated annual rental for each well, and the free use of gas for domestic purposes. Beyond this the question of whether or not the quantity of gas was profitable was for the decision of the lessee. It may be that the final disposition of the product of the well was such as to amply remunerate it for the delay in

finding a market." There is no evidence that the well was not in paying volume. * * *

Therefore we reverse the decree, and dismiss the bill filed by the McGraw Company, and we decree that the lease in the record specified dated the 20th day of March, 1907, from Hugh Evans and wife to the McGraw Oil & Gas Company, be canceled, annulled, and set aside as to the rights of the Crystal Ice Company, Robert M. Kennedy, the South Penn Oil Company, and all other parties having rights derived under and by virtue of the lease in the record specified, dated the 20th day of September, 1899, made by Hugh Evans and wife to U. S. Ditman and J. C. Gawthrop; and this cause is remanded to the circuit court of Taylor county for further proceedings.

Section 3.—Other Mining Leases.

PLUMMER v. HILLSIDE COAL & IRON CO. ET AL.

1894. SUPREME COURT OF PENNSYLVANIA.
160 Pa. St. 483, 28 Atl. 853.

TRESPASS q. c. by Emma A. Plummer against the Hillside Coal & Iron Company and the Lackawanna Coal Company, Limited. Judgment for defendants. Plaintiff appeals. Affirmed.

WILLIAMS, J.—The learned counsel for the appellant states the point in controversy very fairly and clearly in the opening sentence of his printed argument. He says, "The contention in this case is confined to the effect and subsequent history of the Calendar lease dated the 1st of October, 1828." His position is that the lease granted only an incorporeal right to the lessee, to be exercised upon the premises covered by the lease. The appellees, on the other hand, contend that it granted the coal in place, under the land, absolutely. The words of the instrument upon which this question depends may be put together thus: "Samuel Calendar * * * doth lease and to farm let to Thomas Merideth * * * all the land that he now holds, * * * and the lease is to continue for the term of one hundred years from this day. Possession of the leased premises shall extend only to their use as a coal field. The lessee shall have full power and possession to search for coal anywhere on the leased premises, in any manner he may think proper, to raise the coal, when found, from the beds; to enter and carry away coal; and to sell the same for his own benefit and profit. He may occupy whatever land may be useful or necessary as coal yards, * * * for roads for transporting the coal; and in case it may prove necessary for securing the full enjoyment of the premises aforesaid as a coal field, as

aforesaid, then the said Samuel covenants and agrees to execute such further writings as counsel learned in the law may deem proper." The purchase money or price of the coal is fixed at $200. If the coal proved abundant, and of a given thickness, then another $100 was to be paid. In addition to this the sum of $1 per annum was to be paid, as rent. The lessor reserved out of this grant the right, for himself and his heirs, to take coal for their own use, so long as they should reside on the land. This instrument contemplated a sale of the coal under the leased premises at a fixed price, to be increased $100 if the quantity of coal reached the proportions described in it. The right of removal was to be exercised within 100 years. The fact that the instrument is in the form of a lease is not material, when the character of the transaction is apparent. Kingsley v. Iron Co., 144 Pa. St. 613, 23 Atl. 250; Montooth v. Gamble, 123 Pa. St. 240, 16 Atl. 594. A written contract, though not under seal, granting the privilege of digging all the coal or ore on the vendor's land, is equivalent to a conveyance of the title to the coal or ore in fee. Fairchild v. Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444. Such a conveyance operates to sever the surface from the underlying stratum of coal; and after such severance the continual occupancy of the surface by the vendor is not hostile to the title of the owner of the underlying estate, and will not give title under the statute of limitations. To affect the title of the owner of the coal, there must be an entry upon his estate, and an adverse possession of it. Armstrong v. Caldwell, 53 Pa. St. 284. But the contention that a right to mine coal in the land of another is an incorporeal one cannot be successfully maintained. The grant of such a right is a grant of an interest in land. Hope's Appeal (Pa. Sup.) 3 Atl. 23. When the grant is, in terms or in effect, a grant of all the coal on the lessor's land, this amounts to a severance of the coal from the surface, and vests a title to the underlying stratum in the grantee. Sanderson v. City of Scranton, 105 Pa. St. 469. This underlying estate may be conveyed under the same general rules, as to notice, as to recording, and as to actual possession, as the surface. After such a severance the possession of the holder of each estate is referable to his title. The owner of the surface can no more extend the effect of his possession of his own estate downward than the owner of the coal stratum can extend his possession upward, so as to give him title to the surface, under the statute of limitations. The owner of the surface can be affected only by the invasion of the surface. The owner of the underlying stratum is not bound to take notice of the invasion of the estates that do not belong to him, but when his own estate is invaded he is bound to take notice. The conclusion thus reached disposes of the title by possession set up by the plaintiff, and of her right to recover in this case.

The appellant cites Oil Co. v. Fretts, 152 Pa. St. 451, 25 Atl. 732; Menish v. Stone, 152 Pa. St. 457, note, 25 Atl. 732,—and other cases in which oil leases were considered, and the rights of the lessors and

lessees defined. A lease granting to the lessee the right to explore for oil, and, in case oil is found in paying quantities on the leased premises, to drill wells and raise the oil, paying an agreed royalty therefor, has been held to convey no interest in the land, beyond the right to enter and explore, unless the search for oil proves successful. If it proves unsuccessful, and the lessee abandons its future prosecution, his rights under the lease are gone. So it might be with a similar lease of lands supposed to contain coal. If the lessee entered, explored the leased premises, and, finding nothing, gave up the search, he would no doubt be held to the same rules, upon the same provisions in the lease, as were applied in the cases cited. The difference in the nature of the two minerals, and the manner of their production, have, however, resulted in considerable differences in the forms of the contracts of leases made use of. When oil is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas, and the fact that a single well may drain a considerable territory, and bring to the surface oil that when in place, in the sand rock, was under the lands of adjoining owners, makes it important for each landowner to test his own land as speedily as possible. Such leases generally require, for this reason, that operations should begin within a fixed number of days or months, and be prosecuted to a successful end, or to abandonment. Coal, on the other hand, is fixed in location. The owner may mine when he pleases, regardless of operations around him. Its amount and probable value can be calculated with a fair degree of business certainty. There is no necessity for haste, nor moving pari passu with adjoining owners. The consequence is that coal leases are for a certain fixed term, or for all the coal upon the land leased, as the case may be. The rule of Oil Co. v. Fretts, supra, is not capable of application to the lease made by Calendar to Merideth in 1828, for several reasons: First. The Calendar lease is, in effect, a sale of all the coal in the leased premises, and consequently a severance of the surface therefrom. Second. It is for 100 years. All idea of haste in development or operating is excluded by the terms of the instrument, and the time for commencing the work of mining is left to the discretion of the lessee. Third. The consideration of the grant was, not the development of the mineral value of the land, but the price fixed by the agreement, and actually paid to the lessor in money. Upon a careful examination of the several assignments of error, we are all of opinion that the judgment must be affirmed. Judgment will be entered accordingly.

TENNESSEE OIL, GAS & MINERAL CO v. BROWN ET AL.

1904. CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.
65 C. C. A. 524, 131 Fed. 696.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee.

This is a bill to remove a cloud from the title to a tract of mineral land situated in Scott county, Tenn. The land in question is wild mountain land, situated in the Cumberland Mountains, and has little or no value, save for its timber and minerals. The plaintiffs are in possession and claim title in fee through conveyance made by one Richard Slaven, under whom the defendants also claim the mineral interest in said lands. The alleged cloud consists in a prior conveyance or agreement of lease or license made by said Richard Slaven to one Geo. W. Colbert under whom defendants claim the mineral and timber interests in said land. This instrument is in these words:

"The said party of the first part, for the consideration of one dollar, to him in hand paid, the receipt of which is hereby acknowledged, as well as the agreements hereinafter mentioned does hereby bargain, sell, and convey unto the party of the second part, his heirs and assigns, all the mineral, coal, iron ore, ore and potter's clay, and other minerals, and all rock or petroleum oil and salines, and all timber suitable for lumber, in, upon, or under the farm or tract of land in the district of No. 1st, in the county of Scott, in the said state of Tennessee, bounded and described as follows: * * * Granting to the party of the second part, or his assigns, the exclusive right to enter upon said lands at any time hereafter, and search for coal, iron ore, and all other minerals, oils, and salines, and, when found, to remove the same from said lands, together with all rights and privileges incident to the mining and securing said coal, iron ore, clay, and other minerals, oils, and salines, including the right of ingress and egress. And the party of the second part agrees to enter upon and make search for coal and other minerals in said lands above described; and should he find coal, iron ore, or other minerals, or oils, or salines, in said lands and adjoining lands, of sufficient thickness, quantity, and quality to justify him, the party of the second part, to open and work said mines, or oils, or salines, then he, or his representatives or assigns, shall pay to the party of the first part, his heirs or assigns, within five years after the completion of a railroad, built in connection with any leading railroad by which said minerals or oil can be taken to any large markets, the sum of ten (10) dollars a year, until mining is commenced upon said premises, or during the continuance of this agreement; and the failure to make these advance payments yearly upon request, shall be deemed an abandonment of this agreement, but not to the injury of the party of the second part, or his assigns. And the party of the second part shall have the right to abandon said lands and mining at any time and remove all his buildings and fixtures from said lands. And the said party of the second part, by himself or assigns, agrees to pay to the party of the first part, his legal representatives or assigns, the sum of ten (10) cents for each ton (2,240 pounds) of screened coal, iron ore, or other minerals mined and removed from said lands herein described; and the price shall be ten (10) cents per 1,000 feet of sawed lumber; and the price or rent for rock or petroleum oil and salines shall be one-twentieth of the net proceeds. But it is understood and agreed that any advance payments of ten (10) dollars as before mentioned to be paid yearly, that shall be made to the party of the first part, are to apply on the payment of rent of coal, iron ore, or other minerals or oil first mined thereafter. The payment of rent per ton on coal, iron ore, other minerals, clays, oils, and sa-

lines, mined and removed, shall be made half-yearly, and all payments required by this agreement shall be made and accepted in bankable funds of the state of Tennessee. It is mutually understood by the parties that the coal, clay, and ore under any dwelling house or other permanent buildings upon the premises shall not be mined out, and as little injury to the surface of said land shall be done as possible, in the mining, removal, and transportation of said coal, clay, and ore, as herein contemplated. It is also mutually understood that the stipulations herein contained shall apply to and bind the heirs, executors, administrators, and assigns of the parties, respectively. In witness whereof, the parties hereunto set their hands and seals the day and year first above written."

Upon the pleadings and evidence, the prayer of the bill was granted, and a cancellation of the instrument above set out decreed.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The contention of the appellant company is that the agreement between Richard Slaven and Geo. W. Colbert, set out in the statement of the case, is a deed of conveyance of the minerals in the land and of the timber thereon, which operated to vest a fee in the minerals and timber, subject to defeasance only upon breach of the agreement to pay $10, upon request, annually, after the completion of the railroad referred to. This construction is based upon the insistence that the terms "bargain, sell, and convey," found in the first clause of the instrument, necessarily characterize it as a conveyance of the timber upon and the minerals under the surface of the land of Slaven. Prima facie this may be true. But before we give these words this construction we must look into the four corners of the agreement and give effect to the whole of the contract. The Cincinnati Southern Railroad was in prospect when this contract was made, and was constructed to a point within nine miles of this property within five years after this contract. But no railroad has been built connecting that railway with this property, and appellants say that they are not under covenant, implied or express, to construct such connecting road. Without such road they say the coal under this land cannot be profitably mined or the timber converted into lumber, and that, having the title to the coal and timber, and the title to any other minerals which may yet be found, they are under no obligation to mine the coal or other minerals, or cut down the timber, until it can be done to their advantage, and that they may hold this estate until such time as it suits them to remove the minerals or oil or timber, and that neither Slaven nor his subsequent lessees can complain because the instrument contains no agreement, express or implied, obligating them to begin or continue mining, if they should choose to begin. Though they have done nothing, and paid only the nominal consideration of $1 under this deed, they justify this nonaction for 25 years by the insistence that one may do as he will with his own, in the absence of a contract to do a particular thing, and that, not having agreed to mine the minerals upon said

land, they are within their right in biding their time, and that, if they shall deem it advantageous to ever commence mining, they are under no covenant, implied or express, to mine any definite quantity, or continually, or until the mineral is exhausted, but may, if they see fit, "abandon said lands and mining at any time, and remove all buildings and fixtures," having reserved the right to terminate the estate vested at will.

The logic of the situation compels the learned solicitor for the appellants to take up this extreme ground, for otherwise their utter failure to do any valuable thing in pursuance of the agreement after the lapse of 25 years would be unaccountable. If in all the time past they have had the right to stand upon their claim to be the owners absolutely of the mineral interests thus severed, in law, from the land, and to refuse to develop and operate that interest, because that is the right of an owner of the fee, the same right to hold onto this estate for the next century is undeniable. That they may be required to pay $10 annually if a railroad shall ever be constructed from the Cincinnati Southern to this land they concede. But this concession is possibly inadvertent; for, although one clause of the agreement does provide for such a payment until mining commences, and that the failure to make these advance payments yearly upon request shall be deemed an abandonment of this agreement, it is added, "but not to the injury of the party of the second part or his assigns." If it is true that the appellants have for $1 acquired the right to prevent Slaven or his assigns from using, exploiting, or mining the mineral interests upon or under his own land, and can at no time be required to convert the timber into lumber, or to open and operate the very valuable vein of coal now known to underlie its surface, to say nothing of the possibilities of iron ore, coal oil, and other minerals, the contract is one of the most unreasonable and one-sided which any court has ever been called upon to uphold. But this $1 was not the real consideration moving to Slaven, for the recital of the contract is that the consideration is one dollar in hand paid, "as well as the agreements hereinafter mentioned." Now, what are these agreements referred to? for before we may conclude that this is an out and out conveyance in præsenti of the timber and mineral interests owned by Slaven, we must scrutinize the agreements which constitute the real consideration, for in the "agreements" we are most likely to find the purpose, intent, and meaning of the instrument regarded as a whole.

First. We find that Colbert agrees "to enter upon said land and make search for coal and other minerals." Why shall he agree to do this, if already he is the fee-simple owner of the minerals that may be hidden there? Second. If he finds such minerals, what then? The agreement provides that, if they are found in such quantity and quality as to "justify him, * * * to open and work same, * * * then" he shall pay $10 per annum, after the completion of the rail-

road mentioned, and upon request, "until mining is commenced, or during the continuance of this agreement." But how long is this "agreement" to continue? There is no stipulation that he shall ever commence to mine, or, if he does, that he shall continue for one day, one year, or until the minerals developed by the "search" he agreed to make shall be exhausted. Upon the contrary, it is expressly provided that "he shall have the right to abandon said lands and mining at any time, and remove all his buildings from said lands." If we should concede that the technical effect of the words of bargain, sale, and conveyance found in the document was to vest in Colbert title to the mineral and timber interests referred to, without regard to the requirement that he should "enter upon and search for minerals" and should pay the stipulated rent of $10 only when his search shall satisfy him that the interests referred to existed in quantity and quality sufficient to "justify him * * * to open and work them," we could not reconcile the claim that this was a deed of conveyance passing the title, with this clause giving to him the right to abandon a fee in this "nether estate" at his will.

The divestiture of a vested legal title by "abandonment" is unknown at the common law, unless it result from some estoppel or adverse possession under a statute of limitations. 1 Cyc. Law, 6; East Tenn. Iron & Coal Co. v. Wiggin, 68 Fed. 446, 15 C. C. A. 510; Calloway v. Sanford (Tenn. Ch. App.) 35 S. W. 778. Manifestly this agreement obligated Colbert "to enter upon and make search for coal and other minerals." In the absence of a stipulation, he was bound to do this within a reasonable time. If this search developed nothing, the agreement was at an end. The payment of the stipulated sum of $10 per annum is "to apply on the payment of rent of coal, iron ore, or other minerals or oil, first mined thereafter." Thus the parties regarded this annual payment as an advance rent payment, to continue "until mining is commenced, * * * or during the continuance of this agreement." This payment of rent is also contingent upon another matter, and that is the construction of a railroad. The payment of rent is to be made on request, "within five years after the completion of a railroad in connection with any leading railroad by which said minerals or oils can be taken to any large market." The annual payments provided for after mining should begin are called or described as "rents," a term characterizing the agreement as a lease or license, rather than as conveyance of the mineral interests.

These considerations lead us to the conclusion that the presence of words of conveyance are not sufficient to require us to hold that the effect of the instrument was to vest in Colbert the title to the timber or mineral interests in this land. The ruling intention, as ascertained from all parts of the agreement, should be given effect. It is difficult to believe that it was intended that title should pass until these minerals had been removed and as they were removed. The con-

sideration to be paid could not be ascertained until that contingency arrived, for no price in solido is mentioned. Whether any mining should ever be done or any price ever paid were both dependent upon future events. The contract was, therefore, for a lease dependent upon conditions. That the exploration for minerals should be made within a reasonable time is of the very essence of the agreement, and a condition precedent to the accruing of the right to take the minerals discovered upon the terms of payment indicated. The failure to make such exploration within a reasonable time, and to make it with such thoroughness and certainty as to determine the existence of mineral or oil, would be fatal to the continuance of the agreement. Upon this, we think, this lease depended as a condition precedent. The case falls within the principles applied by this court in the cases of Allegheny Coal Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604, and Logan Gas Co. v. Grt. Southern Gas Co. (C. C. A.) 126 Fed. 623, and by the Supreme Court of Tennessee in Petroleum Co. v. Coal & Coke Co., 89 Tenn. 381, 18 S. W. 65. To the same effect are the cases of Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Conrad v. Moorehead, 89 N. C. 31; Knight v. Coal & Iron Co., 47 Ind. 105, 17 Am. Rep. 692; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

This duty of exploring for minerals meant for all of the minerals named which might reasonably be expected to be found, considering known geological conditions. The search actually made was not made until 1888 or later, a period of 15 years after the date of the agreement, a delay beyond all reason. When made, it was extremely superficial and valueless from any reasonable view. Coal exposed by washes on side of the mountain was observed, but the depth of the vein, the surface underlain, and character of the coal are as unknown today as upon the day of the lease. No effort seems to have been made to discover iron or coal oil. This kind of an investigation was delusive. The search was a purely nominal one, and not a faithful effort to comply with the agreement. The Supreme Court of Tennessee, in the case cited above, said of such a requirement in a mining lease:

> "The 'testing' should be so thoroughly done as to determine, not only the presence of such minerals, but their commercial value, considering their abundance and accessibility. The information resulting should be such as a prudent and experienced investor would desire to know before expending his capital in the digging of shafts or the erection of machinery proper for the profitable working of such a mine."

Slaven was never notified of even the superficial search made, nor that the lessee proposed to hold on and comply with the terms of the lease. No rent was paid or demanded. No taxes were paid. Not $1 was ever expended in endeavoring to make the lease productive to the lessor. In this situation of things Slaven clearly expressed his

intention to avoid the agreement by making a new lease in 1890 to the appellees. Logan Gas Co. v. Grt. Southern Gas Co. (C. C. A.) 126 Fed. 623, 626; Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. 901; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

But, independently of any other ground, the general provision of this lease, authorizing the lessee to abandon whenever he should see fit, makes it a lease at the will of the lessee. An estate terminable at the will of one of the parties is determinable at the will of either, though it purports to be terminable at the will of one only. 1 Washburn, Real Property, 371 (side paging); Taylor's Landlord & Tenant, § 14; 18 Am. & Eng. Ency. of Law (2d Ed.) 182.

The decree of the court below is accordingly affirmed.[13]

WILMORE COAL CO. v. BROWN ET AL.

1906. CIRCUIT COURT, W. D. PENNSYLVANIA. 147 Fed. 931.

ARCHBALD, District Judge.[14]—This is a bill to remove an alleged cloud on the plaintiff's title. In the years 1878 and 1880, the defendant J. Willcox Brown, a resident of Baltimore, Md., secured a large number of mining leases, aggregating about 16,000 acres, in different tracts, of various sizes, in Somerset county, Pa., as well as a like number in the adjoining counties of Indiana and Cambria, nineteen of which, of the Somerset lot, covering some 2,400 acres, are involved in the present suit. These leases were indentures under seal, and severally undertook, for the consideration, in some cases of $5 and in some cases of $10, to grant, bargain, and to sell to the said J. Willcox Brown, his heirs, executors, administrators, and assigns, "all the iron ore, coal, cement, and fire clay, and all other minerals of every kind," under the different tracts described, "including the privilege of boring any number of wells and taking therefrom, by such means as are or may be most practicable, petroleum, carbon, or coal oil, also any salt water that may be found on the premises and manufacturing the same into salt," together with the full and exclusive right, liberty, and privilege of mining, taking, and carrying away the said iron ore and other minerals, and of using such stones, earth, and water as might be necessary or required for conducting the mining operations. A few acres were reserved around buildings, and enough coal for the grantor's own use, and in some cases such as he might sell to his neighbors. The leases were to run for 99 years; the grantors covenanting at the end of

[13] The opinion of the court below is omitted.
[14] Parts of the opinion are omitted.

that time to execute other leases of like tenor, for a similar term, renewable forever. In consideration whereof it was agreed by the grantee that on the expiration of every three months, whenever any ore or other minerals were mined, quarried, or otherwise reduced to possession and removed from the premises, he would render to the grantor, his heirs, executors, and assigns, a true and correct account thereof, paying for every ton of iron ore ten cents; for every ton of coal, cement, fire clay, or other minerals than iron, five cents; and for every hundred barrels of petroleum or coal oil, and every one hundred bushels of salt, five per cent. of the net profits. The leases were duly acknowledged and put on record in the office for the recording of deeds in Somerset county, Pa., in July, 1880. * * *

In securing the leases in suit and others in that region, Mr. Brown did not expect to do any mining personally, and he has not, either by himself or others, nor has he paid royalties, at any time, on any of them; his purpose being to sell the leases to others or to transfer them to some company in which he had an interest, which would operate them. He sold some of his holdings in the southern part of the county in this way, and he made several attempts to interest parties in the others, including the New York Central Railroad people, the Erie people, and the Baltimore & Ohio. Learning of Mr. Berwind's purchases, he finally offered them to him, but without success; these negotiations ending in the spring of 1895, after which no others were undertaken. In 1892 certain of the leases were assessed and sold for taxes, but were redeemed by Mr. Brown, who paid some $1,500 to do so. They were sold again in 1896, but this he resisted, and succeeded in having the sale set aside by the court. Learning in 1902 that the Berwind-White Company were mining on certain of the lands which he had leased, he sent an engineer to investigate the matter, receiving from him a detailed and extended report which confirmed the information, upon which he took counsel with the idea of legal action. Some delay was experienced, however, with regard to this; the one-quarter interest, which he had assigned to the agent who secured the leases, being outstanding in the hands of various parties. But, these having been got into line, a corporation was organized—the New Amsterdam Coal Company, defendant—to which all interests were transferred in exchange for stock; and in 1904 actions were brought by that company against the Berwind-White Coal Mining Company in the United States Circuit Court for the Southern District of New York for damages for taking the coal from six of the different tracts in controversy, following which, in May, 1904, the present bill was filed. These are the general facts. Others will be referred to as we proceed. The question is whether, under the showing made, the plaintiff is entitled to the relief desired.

According to the law of Pennsylvania, by which the subject is necessarily governed, the so-called leases to the defendant Brown

constitute a sale and conveyance of the coal and minerals in place. This is the effect of all the cases, from Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760, down, and, if reiterated declaration is to count for anything, is not to be gainsaid or denied. Sanderson v. Scranton, 105 Pa. 469; D., L. & W. R. R. v. Sanderson, 109 Pa. 583, 1 Atl. 394, 58 Am. Rep. 743; Hope's Appeal (Pa.) 3 Atl. 23; Montooth v. Gamble, 123 Pa. 240, 16 Atl. 594; Fairchild v. Dunbar Furnace Co., 128 Pa. 485, 18 Atl. 443, 444; Kingsley v. Hillside Coal & Iron Co., 144 Pa. 613, 23 Atl. 250; Lazarus' Est., 145 Pa. 1, 23 Atl. 372; Timlin v. Brown, 158 Pa. 606, 28 Atl. 236; Plummer v. Hillside Iron & Coal Co., 160 Pa. 486, 28 Atl. 853; Lehigh & Wilkes-Barre Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919. "It is now well established," says Rice, P. J., in Hosack v. Crill, 18 Pa. Super. Ct. 90, affirmed 204 Pa. 97, 53 Atl. 640, "that an instrument which is in terms a demise of all the coal in, under, and upon a tract of land, with the unqualified right to mine and remove the same, is a sale of the coal in place; and this, too, whether the purchase money stipulated for is a lump sum or is a certain price for each ton mined, and is called 'rent' or 'royalty,' and also notwithstanding a term is created within which the coal is to be taken out." It is true that in Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197, there is an apparent attempt to hark back to something else; it being declared to be inaccurate and unfortunate to call such a conveyance a sale, because of the tendency to mislead and the rules with respect to sales being held not to be indiscriminately applied. This is also approved in Coolbaugh v. Lehigh & Wilkes-Barre Coal Co., 213 Pa. 28, 62 Atl. 94. But, whatever may be the modification introduced by these cases, the general doctrine remains that a grant of all the coal, with the right to remove the same, however denominated and by whatever terms conveyed, severs the coal from the surface and vests in the grantee an estate therein, with all that is incident and appurtenant thereto; and that in effect is what we have here. By indenture under his hand and seal, duly acknowledged and put on record, the grantor in each instance grants, bargains, and sells to the defendant J. Willcox Brown, his heirs and assigns, all the iron ore, coal, cement, fire clay, and other minerals of every kind, with the full and exclusive right of mining and removing the same, to and for his and their only proper use and benefit. This brings the case squarely within those which have been cited, and conveys a fee. It is true that a term is fixed within which these rights are to be exercised; but that is not material, and another is provided for, renewable forever, if it were. True, also, it is stipulated in most of the leases that a railroad shall be built within five years. But except as this introduces a condition upon which the estate is taken, and for breach of which it is made defeasible, it does not affect the character of the conveyance or the interest which passed. It is idle to argue, from this or any other provision, that the arrangement is unilateral, the defendant

merely having an option, ineffective until formally accepted by entry or other affirmative act. Not only was the grant out and out and immediate, but there was a reciprocal undertaking by the defendant to account and pay every three months at a certain royalty, for the coal and minerals mined, which notwithstanding there was no minimum, imposed a direct and positive obligation; a covenant to mine with reasonable diligence being implied. Equally useless is it, also, to contend that the provision with regard to the building of a railroad was a condition precedent, according to which, until complied with, no interest was acquired. The importance of a railroad may be conceded, no development of the region being possible without it, and the parties who stipulated for it were therefore wise. But whatever the necessity for it, or the promise with regard to its construction, there is nothing in either, out of which to make a condition precedent, holding up the grant until performed. The provision is, not that the leases shall be ineffective until the railroad is built, but that they shall be null and void unless built within a certain time. This recognizes that the estate conveyed is to vest meanwhile, making it subject to be divested later, in case of a failure to comply, creating a condition subsequent, upon which the estate is taken and held, Rannels v. Rowe (C. C. A.) 145 Fed. 296.

As a condition subsequent, however, the promise to build a railroad has to be reckoned with, and the question is as to the effect which is so to be given it. Four of the leases are untrammeled by anything of the kind—the George Fosler, Samuel Wible, Gottlieb Bantlin, and Harrison Lohr—the alleged verbal promise to these parties being unsustained; and as to them the subject may be dismissed. Those which remain differ somewhat with respect to the terms of the condition and the steps subsequently taken to enforce it, requiring a separate examination as to each; but to a certain extent they fall into classes by which the matter is simplified. In four of the leases—the David J. Shaffer, David Seese, Israel Seese, and Samuel Knavel—it is stipulated, with some immaterial variations, that if the railroad is not built or commenced along Paint creek within five years they are to be null and void. This is distinct and specific, and beyond question has not been performed. No claim is able to be made, as is done with regard to some, that the building of the Baltimore & Ohio branch along Stony creek in 1880, within the five years, was a fulfillment. All of the leases named are located in the neighborhood of Windber, four or five miles up from where Paint creek empties into Stony, at which distance a railroad along the latter is of no immediate, although there may be a remote, advantage. At all events it does not meet the terms of the condition, which the lessors had the right to insist on, and is not, therefore, a compliance with it. But a condition subsequent, such as this, is reserved for the benefit of the grantor and his privies in blood, who alone can take advantage of the breach, unless it is otherwise stipu-

lated. McKissick v. Pickle, 16 Pa. 140. It is not available—by all the authorities—to any and every one who may happen along afterwards in the title. Atlantic & Pacific Railroad v. Mingus, 165 U. S. 413, 17 Sup. Ct. 348, 41 L. Ed. 770; Wills v. Mfrs.' Nat. Gas Co., 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603. The estate continues undisturbed until the proper steps are taken to enforce the forfeiture, the right to do which subsists as a mere right of action, which cannot be conveyed to or vested in a stranger. Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101. Nor are the present conveyances leases, within the meaning of Act 32 Hen. VIII, c. 34, by which the right might otherwise be claimed. Rob. Dig. Brit. Stat. 227. Unless, therefore, a move was made by those who were entitled to assert the breach, it is not open to the plaintiff company, which has taken title subsequently. The usual means is by entry for condition broken, but it may be by any equally significant act; a freehold estate at common law being able to be determined only by act in pais of equal notoriety with that by which it was created. Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447. It remains to be seen, what, then, if anything, was done in that direction by either of these lessors.

On December 17, 1892, Israel Seese and wife, by deed of general warranty, sold and conveyed to Robert H. Sayre, his heirs and assigns, all the coal underlying the land which they had leased in December, 1878, to the defendant Brown; Mr. Sayre subsequently conveying to the Wilmore Coal Company, by whom entry was made and the coal mined. The out and out conveyance of the coal in this way by the lessor was a direct and unequivocal assertion of title to and dominion over it, which being followed by the recording of the deed, the equivalence of livery (Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760), as well as the entry on and mining of the coal under it, must be regarded, not only as expressive of an intent to take advantage of the lessee's default, but as effective to do so, the same as by entry and forfeiture actually declared. The two grants being inconsistent and conflicting, the defeasible one, under the assault so made upon it, must give way; the outstanding estate being thereby divested, and revested in the original grantor, for the benefit of his grantee. Emery v. De Colier, 117 Pa. 153, 12 Atl. 152; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732; Wolf v. Guffey, 161 Pa. 276, 28 Atl. 1117; Bartley v. Phillips, 179 Pa. 175, 36 Atl. 217; Stone v. Marshall Oil Co., 188 Pa. 602, 41 Atl. 748, 1119; Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; Wheeling v. Phillips, 10 Pa. Super. Ct. 634. The case of Rannels v. Rowe (C. C. A.) 145 Fed. 296, where this is denied, is to be distinguished; the second deed, although recorded, not having been brought home to the original grantee by act or entry under it. This lease, so far as the coal is concerned, is therefore dead. * * *

As to the John D. Shaffer lease, also, the lessee failed to comply. The provision there was that the lease should be void if the railroad

was not commenced along Stony creek within five years, which would be fulfilled in terms by the building of the Baltimore & Ohio branch in 1880, if it stood alone. But it was additionally provided that "the railroad must come within one and one-half miles of the said farm," and this is as much a part of the condition as anything; and as the property was located some four miles up Paint creek, and the Baltimore & Ohio along Stony creek came no nearer than that, the condition clearly was not met. This is, however, of no advantage to the plaintiff; for, according to the test applied above, nothing was done to enforce the breach. It is true that there was a deed to Mr. Berwind from John D. Shaffer, November 9, 1896, for all the coal in the "B" or Miller vein, one of the two veins leased to the defendant Brown. But this conveyance was made expressly subject to the terms and conditions of the lease; the grantee being given the reciprocal benefits and advantages derived therefrom. This was a recognition of the lease, and not an avoidance of it. Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696. And while it was, indeed, further provided that if the lease was void, or at any time thereafter should be held invalid, the coal as so conveyed should be free from its operation, the grantee in this respect, so far as possible, being put in the grantor's place, yet this falls far short of the assertive action required to declare the condition broken and annul the lease, which, while voidable, therefore, at that time, must now be held to be intact. * * *

To summarize the results upon this part of the case: Out of the 19 leases in suit, 15 of which have been called into question by reason of the condition with regard to the building of the railroad, the Israel Seese, David Seese, Samuel Knavel, David J. Shaffer, and John Koontz—5 in all—must be held to be no longer in force; the condition in each instance having been broken, and proper action taken to assert the breach. But as to the rest, some 10 in number, counting the Maria Young for the moment, there is nothing of the kind upon which this can be affirmed; and if they are to be avoided, therefore, it must be upon some other ground.

There remains to be considered, however, the questions of forfeiture and abandonment which have been raised, and which apply to all the leases alike, affording additional ground, if sustained, for declaring invalid those which have been already so held. The claim of forfeiture is based on the failure of the lessee to mine or pay royalty; this being in absolute and flagrant disregard, as it is said, of the purpose of leasing, which was to secure to the lessors an income from the royalties to be received. Although no minimum quantity was fixed, a covenant to mine with reasonable diligence is unquestionably to be implied. Watson v. O'Hern, 6 Watts (Pa.) 362; Lyon v. Miller, 24 Pa. 392; Ellis v. Lane, 85 Pa. 265; Koch & Balliett's App., 93 Pa. 434; Pittsburg Railroad Company's App., 99 Pa. 177; Ray v. Gas Co., 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290,

21 Am. St. Rep. 922; Patterson v. Graham, 164 Pa. 234, 30 Atl. 247; Aye v. Phila. Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; Price v. Nicholas, 4 Hughes, 616, Fed. Cas. No. 11,415; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Sharp v. Behr (C. C.) 136 Fed. 795; Brewster v. Lanyon Zinc Co. (C. C. A.) 140 Fed. 801; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; Sharp v. Wright, 28 Beav. 120. But the remedy for a breach is not a bill to forfeit or avoid, but an action at law for damages (Koch & Balliett's App., 93 Pa. 434; Janes v. Emery Oil Co., 1 Penny. [Pa.] 242), or, possibly, an ejectment, based on a right of entry, for nonperformance (Barker v. Dale, 17 Pittsb. Leg. Journ. 19, Fed. Cas. No. 988; contra, Blair v. Peck, 1 Penny. [Pa.] 247). The lessee, as we have seen, has an estate in the coal, which cannot be defeated or divested merely by reason of covenants broken; it not being so provided in the lease. "The common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term, in the absence of an express stipulation in the lease, or the reservation of the power of re-entry in case of such breach. The general remedy of the lessor in such case is merely by action for the recovery of damages." 18 Am. & Eng. Encycl. Law (2d Ed.) 369. And this applies to implied covenants, the same as to express ones. Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N. E. 502. It may be that an action at law is not at all times adequate, and that a chancellor under some circumstances would be authorized to interfere in consequence. Brewster v. Lanyon Zinc Co. (C. C. A.) 140 Fed. 801. But that is not the case here. It may not, indeed, be altogether easy to say, without any minimum quantity reserved, for just how much at any given time either of the lessors in the case in hand would be entitled to sue; but that cannot be regarded as insuperable, other mining operations similarly situated and conditioned affording a comparative guide. The lessee was to account and pay every three months for what he had mined; and each lessor would therefore have the right, as the measure of his damages, to sue at the end of every such period for whatever amount could have been produced with the exercise of reasonable diligence from the tract involved, having regard to its size and the situation of the coal upon it, as well as the methods of mining in vogue at the time in that general section of the bituminous coal field (Bradford Oil Co. v. Blair, 113 Pa. 83, 4 Atl. 218, 57 Am. Rep. 442); and that (to meet an objection of defendants' counsel, and notwithstanding what is said in Price v. Nicholas, 4 Hughes, 616, Fed. Cas. No. 11,415, which gives some countenance to it), without reference to whether there were railroad or other facilities for transporting or handling it, as to which the lessee took the chance, having made no stipulation with regard to it, other than what we have seen. While, then, it was of the essence of the contract that mining should be prosecuted with reasonable

diligence, and it would no doubt be convenient, as well as conducive to justice, if the right to forfeit for the indefinite and long-continued failure to mine or pay royalties could be imported into it—a sort of forfeiture by abandonment, as it is denominated in Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696—no case, by actual decision,[14a] seems to have gone that far, and nothing, therefore, can be made out of the fact here.

Quite different, however, is the matter of abandonment. Ordinarily this is a question of fact, to be determined by the circumstances; the intent being largely controlling. But under certain conditions it may become a question of law, to be declared by the court, particularly when the facts are undisputed. Atchison v. McCulloch, 5 Watts (Pa.) 13; Forster v. McDivit, 5 Watts & S. 359; Sample v. Robb, 16 Pa. 305; Paine v. Griffiths, 86 Fed. 452, 30 C. C. A. 182. Legally defined, it may be said to be the giving up or relinquishment of property to which a person is entitled, with no purpose of again claiming it and without concern as to who may subsequently take possession. 1 Cyc. 4; Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181; Judson v. Malloy, 40 Cal. 299; Hagan v. Gaskill, 42 N. J. Eq. 215, 6 Atl. 879; Dikes v. Miller, 24 Tex. 424; Burke v. Hammond, 76 Pa. 172. It is the voluntary forsaking or throwing away of property, leaving it open to be appropriated by the first comer. McGoon v. Ankeny, 11 Ill. 558; Eads v. Brazelton, 22 Ark. 499, 79 Am. Dec. 88. It may be a question how far a vested legal title to a corporeal hereditament can ever be lost by mere abandonment or neglect (1 Cyc. 6; 2 Washb. Real Prop. [6th Ed.] § 1888; Mayor v. Riddle, 25 Pa. 259), although it is held that it may be, in Holmes v. Railroad, 8 Am. Law Reg. (O. S.) 716, and seems to be recognized as possible in Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732, although by nothing short of the statute of limitations, as it is there said. But with regard to inchoate, and particularly mining and other similar rights and privileges, the doctrine is well established, differing only in its application with the nature and extent of the rights and estates granted, and the character of the mineral or other thing affected, whether fugitive, like oil and gas, or solid and stable, like coal and ore in place. 1 Cyc. 7; 20 Am. & Eng. Encycl. of Law (2d Ed.) 775 and 785. Thus, in Aye v. Phila., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696, where there was a lease of lands for 20 years, with the exclusive right of searching and operating for oil and gas, an unexplained cessation for 4 years was held to raise a presumption of abandonment. In Patterson v. Graham, 164 Pa. 234, 30 Atl. 247, also, where standing timber was sold for a definite price, with the

[14a] Bordering on this, however, it is said by Porter, J., in Cole v. Taylor, 8 Pa. Super. Ct. 19, with regard to a two years' delay to operate an oil lease: "It would seem that the failure so to produce for so unreasonable a length of time ought in equity to work a forfeiture of the rights of the lessees."—Rep.

privilege of manufacturing it into lumber on the land, under which the vendee entered and cut substantially all the saw timber available, and then ceased operating and removed his mill, an attempt to resume 11 years afterwards and cut the timber which had matured meanwhile was held to be a trespass; the rights of the vendee having been lost by abandonment. So in Paine v. Griffiths, 86 Fed. 462, 30 C. C. A. 182, a case peculiarly like the one in hand, both in the terms of the grant, the minerals affected, and the neglect to mine, it was held by the Court of Appeals of this circuit, that where coal and other minerals, including oil and salines, had been conveyed upon a certain royalty the failure to operate or do anything under the grant for upwards of 20 years amounted to an abandonment as a matter of law, which justified a bill to declare it void as a cloud upon the title. It was further held that mere speculative attempts by the grantee to dispose of his rights were entitled to no consideration as evidence of a contrary intent; nothing further having been done and there being an utter disregard of the obligation to mine, upon which the grant rested. It is true that the right to abandon was expressly given, of which the neglect of the grantee might be regarded as evidence of a purpose to avail himself. But no point was made of that; abandonment being squarely based upon the facts which have been alluded to. See, also, Worrall v. Wilson, 101 Iowa 475, 70 N. W. 619, for another case of a coal lease which was held to have been abandoned.

In the present instance, at the time the bill was filed, from 24 to 26 years had elapsed since the leases were executed, during which time not a thing has been done by the defendant Brown towards the mining or development of any of the properties covered by them. He has simply stood by and held on, endeavoring at times to interest others who would do something, and in a few instances selling and disposing of his rights for a consideration. According to his own admission, he never intended to do more. In the meantime, by the independent enterprise and efforts of other parties, the territory which was before discredited has been tested and shown to be valuable, and a railroad built into it. The original lessors, evidently despairing of any results from his direction, and in some instances with a declared object of getting rid of the incubus of these leases have sold out to others by whom these developments have been effected and the mining of coal extensively produced. Under the circumstances, the rights granted to the defendant by the leases in controversy must be regarded as relinquished and abandoned. No doubt, he took an estate in the minerals conveyed, but the grant was for a definite purpose; the consideration to the original owners being, not the paltry $5 or $10 recited in the deeds, whether paid or unpaid, but the royalties which were to be derived as the result of mining. The lessee was to make the minerals of value to them, which was the whole inducement for parting with them, and that, with due diligence, an obligation which has been disregarded for nearly a genera-

tion. The lessee's idea is that he can lie by indefinitely and yet retain the rights granted, having 99 years, as it is said, in which to mine, with the privilege of 99 more, and after that forever. Time is of no consequence, according to the argument, and haste not contemplated; developments being virtually left to his discretion, subject only to liability in damages for unreasonable inaction. But this is not the construction to be adopted. Judged by its purpose, the grant was not absolute and unconditional, but qualified, and the neglect to exercise the rights and privileges conveyed; for the period which appears here, to the grave detriment of the grantors, is to be taken as a relinquishment and abandonment of them, and that without regard to the acts or intent of the grantee, short of actual assertive operation. Title to land is lost by 21 years' adverse possession, by virtue of the statute, and abandonment may well be presumed by analogy, with regard to mining rights and privileges, conditioned on the payment of royalties, where there has been an absolute neglect to mine or pay, for a like period. No doubt the lessee here has had no idea of abandoning if he could help it, any more than of personally operating. He may also have made efforts to sell to or interest others, although nothing in this direction seems to have been done for a number of years. Within his legal rights, his purpose is immaterial; but speculative attempts of this kind amount to nothing on the question of abandonment. Paine v. Griffiths, 86 Fed. 452, 30 C. C. A. 182. It may be further true that, while in the market in this way from the start, there have been no takers, because of the coal in that section being underestimated, and for lack of full railroad facilities, until Mr. Berwind took hold of it. Taxes have also been paid, the few years they were assessed; and, when it was found that the coal was being mined, parties were sent to examine and report; and, finally, action was brought on account of it. But all this was ex parte and unrelated, and of no consequence. The fact remains that not a thing was done nor a right exercised under the leases for upwards of 24 years, and looking at it from the standpoint of the lessors, who have waited in all conscience as long as could be expected, they are therefore to be regarded as thrown up and abandoned.

It is said, however, that in Plummer v. Hillside Coal Co., 160 Pa. 483, 28 Atl. 853—followed by the Court of Appeals of this circuit in a subsequent action between the same parties, 104 Fed. 208, 43 C. C. A. 490—even the lapse of 60 years was held not to amount to this. But the distinction between that case and this is manifest. There there was a sale and conveyance of the coal outright for the price of $200, which in that early day and place was evidently accepted as its full value; an extra $100 being provided for in case the coal proved to be abundant and of a certain thickness. Beyond this there was no obligation on the part of the lessee, except the nominal rent of $1 a year, inserted probably to carry out the idea of a lease which was the form of conveyance adopted. The consideration to the lessor

was not thus the development of the mineral value of the land as here. The lessee bought the coal as it stood in place at a definite price in cash; the only restriction being that he should get it out within the term of the lease, 100 years. This, as the court is careful to point out, is the controlling distinction, and the case affords no guide, therefore, where it does not appear. Nor, in adopting and following it, can the Court of Appeals be regarded as recalling or qualifying the law laid down in Paine v. Griffiths, 86 Fed. 452, 30 C. C. A. 182, where abandonment was found, under circumstances and with respect to leases, closely similar to those in hand.

It is finally said, however, that the questions litigated are legal, to be disposed of in a court of law, and that a court of equity cannot constitutionally take cognizance of them. North Penn Coal Co. v. Snowden, 42 Pa. 488, 82 Am. Dec. 530; North Shore R. R. v. Pennsylvania Co., 193 Pa. 641, 44 Atl. 1083. Actions, moreover, as is pointed out, have already been brought in the United States Circuit Court in New York, where they can appropriately be considered and passed upon, which it is the purpose of the present bill, as it is said, to forestall. Meek's App., 97 Pa. 313. But the removal of a cloud by bill, in the nature of a bill quia timet, is a well-established ground of equitable jurisdiction, and may be resorted to under proper circumstances even where the legal title is involved, and although it may not have been previously established by action at law. 17 Encycl. Plead. & Pract. 278. It is not to be exercised where there is an adequate legal remedy, but that is not the case where the moving party is in possession, and so is not in a position to assert or protect his title by action. Martin v. Graves, 5 Allen (Mass.) 661; Stewart's App., 78 Pa. 88; Dull's App., 113 Pa. 510, 6 Atl. 540; Slegel v. Lauer, 148 Pa. 236, 23 Atl. 996, 15 L. R. A. 547; Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532. Neither is a pending action a bar, where it is between other parties, and extends to only a portion of the controversy, which is the situation here. Eaton v. Trowbridge, 38 Mich. 454; Brewster v. Lanyon Zinc Co. (C. C. A.) 140 Fed. 801. The actions in New York are against the Berwind-White Coal Mining Company, and not against the plaintiff, and, whatever the relation between the two, they are nevertheless distinct and independent parties, with separate, however intimate, interests. But, more than this, the actions referred to concern only a few of the leases, as to each of which the facts are more or less different, and differ, also, with respect to those which remain. Under similar circumstances it was accordingly held, in Eaton v. Trowbridge, 38 Mich. 454, not only that a bill to remove a cloud could be entertained as to the lands not so directly drawn in controversy, but that it might be extended to embrace those actually involved in the actions pending, so as to put an end once for all to the whole litigation.

In the present instance, the material facts are not disputed, and the rights growing out of them are clear; and, having to be determined

in any event by the court, it is of no consequence whether they are determined by a court of equity or a court of law. Ferguson's App., 117 Pa. 426, 11 Atl. 885; Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532. For the reasons given, the leases held by the defendants are clearly invalid; and, outstanding and actively asserted as they are, and that not by one action but by several, which are capable of being indefinitely and vexatiously multiplied according to the number of leases and the mining operations under each of them from time to time, they constitute a serious cloud upon the title, not only as against the present owners, but any others, who might otherwise be inclined to purchase from them. From this, according to all the authorities, there being no other adequate remedy open, the plaintiff company is entitled to be relieved. Sharon v. Tucker, 114 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532. And to make the decree effective the invalid instruments by which the cloud is created will be required to be delivered up and canceled, and a minute of it made in the office where they are on record. Neill v. Hitchman, 201 Pa. 207, 50 Atl. 987. Limited always, however, to the coal, and not the other minerals, as to which alone an issue has been made.

Let a decree be drawn in favor of the plaintiff to this effect, with costs.

LOVELAND v. LONGHENRY ET AL.

1911. SUPREME COURT OF WISCONSIN. 45 Wis. 60, 129 N. W. 650.

ACTION by the Grant County Mining Company, prosecuted by C. A. Loveland, Jr., its trustee in bankruptcy, against Martin Longhenry and others. From a judgment dissolving the preliminary injunction and dismissing the complaint, plaintiff appeals. Modified and affirmed.

Suit by the lessee to enjoin repeated and continuous trespass on its leasehold by the landlord and those claiming under him. Defense that the lease was terminated by forfeiture.

TIMLIN, J.[15]—The defendant Longhenry is the owner in fee of several adjoining tracts of mineral-bearing land and on December 6, 1906, executed and delivered to the Grant County Mining Company an instrument in writing by the terms of which, "in consideration of the rents, covenants and conditions herein agreed to be paid, kept and performed by the party of the second part," he leased and let for mining purposes three parcels or tracts of this land. To the first-described parcel, viz., lot 32, he had no title, and it was probably inserted in the lease by mistake. The second parcel is part of lot No. 37; and the third parcel is part of a tract which we may designate

[15] Parts of the opinion are omitted.

and which was known as the "Nagel Tract." The instrument further provided that the lessee should "commence operations on said premises on or before the first day of July, 1907, and thereafter is to prospect said lands and work, develop and operate any mine or mines discovered on said land in a good, reasonable and minerlike manner for at least nine months in each and every year, subject, however, to strikes, delays of carriers and breakages of machinery and other causes beyond the control of the second party." The lessor retained surface rights except such as would be necessary for sinking shafts, equipping machinery, and raising ore. Provision for payments was as follows: "The party of the second part agrees to and with the party of the first part to pay him as rents and tributes for the uses, rights and privileges hereby given one-tenth part of the value at the railroad of all lead, drybone, zinc and other ores and minerals discovered and mined upon said premises." It is noticeable that the lease fixed no time for its expiration, fixed no day for the payment of rents or tributes, and contained no express provisions for forfeiture. * * *

With reference to the land covered by the written lease, the circuit court found on sufficient evidence that the Grand County Mining Company after entering and beginning work under the written lease in question, discontinued mining operations on or about September 1, 1907, and carried on no further work of this kind until November 14, 1908; "that the delay and neglect to prospect said lands and work, develop and operate any mine or mines discovered thereon, was not caused by strikes, delays of carriers, breakages of machinery, or any other causes beyond the control of the Grand County Mining Company; that said Grant County Mining Company did not prospect said lands and work, develop, and operate any mine or mines discovered on said premises in a good, reasonable and minerlike manner or as provided in said lease." The evidence shows beyond dispute that no mine and no "crevice or range" containing ore was discovered on the lands included in the written lease in question. There is no proof of the usages of miners. After or at the time of serving his notice of forfeiture Longhenry authorized the defendant Wisconsin Zinc Company and its employé Thorne to prospect for ore on that part of the Nagel tract covered by the written lease in question, and the Grant County Mining Company brought this suit for an injunction against Longhenry, the Wisconsin Zinc Company, and Thorne to restrain repeated and continuous trespasses in so doing. While the suit was pending the Grant County Mining Company became bankrupt, and the action is now prosecuted by its assignee in bankruptcy. The circuit court denied any relief to the plaintiff and dismissed its complaint.

We may leave out of consideration the failure to pay rent or tribute on ore mined because there was no ore mined on any land covered by the written lease in question. We may also leave out of con-

sideration any failure to "work, develop, and operate any mine or mines discovered on said land in a good, reasonable, and minerlike manner for at least nine months in each and every year," because there was no mine discovered on any land covered by said written lease. This leaves the only default of the plaintiff to consist of suspending prospecting operations on said land from September 1, 1907, to November 14, 1908. The lease is expressly given in consideration of the rents to be received and the covenants and conditions to be performed by the lessee. No rent would ever become due if no ore was discovered and mined. No ore would be discovered without prospecting. One of the stipulations of the lease going to the whole consideration and described therein as a covenant and condition was that the lessee should after July 1, 1907, prospect the lands. This meant diligent and fairly continuous prospecting and search for a mine so that the landowner would receive something for his land. While analogies arising from urban or agricultural leases are not to be wholly rejected, it must be remembered that these mining leases form a distinct class of instruments creating special and peculiar legal relations and legal rights. In Maxwell v. Todd, 112 N. C. 677, 16 S. E. 926, the mining lease had a fixed term of 99 years, but otherwise it was very similar in terms to the lease in the instant case. The court noticing that there was in the lease no stipulation for forfeiture for failure to open and work the mines held that the construction which the law put on the lease would be the same as if such stipulation had been expressly written therein. The contrary construction would prevent the lessor from getting his tolls under the express covenant to pay the same and at the same time deprive him of all opportunity to work the mine himself or lease it to others. In Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179, there was a mining lease from Starn to Huffman for one year and as much longer as Huffman should continue to work the mine, the lessee to pay 10 cents per ton for all coal mined and begin mining coal on or before December 19, 1902, and pay for said coal every 30 days. There was nothing in the form of a condition, and no express stipulation for forfeiture. Nothing was done under the lease, and it was held that this called for a termination of the lease. Many cases are collected and reviewed in the opinion of the court. See, also, Shenandoah L., etc., Co. v. Hise, 92 Va. 238, 23 S. E. 303; Western Pa. G. Co. v. George, 161 Pa. 47, 28 Atl. 1004; Woodward v. Mitchell, 140 Ind. 406, 39 N. E. 437; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; 20 A. & E. Ency. of Law, 779, 780, 781; 26 Cyc. 708, 709, and cases.

In Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452, it is said: "In leases of mineral lands, of the nature of the one in question, where the lessee agrees to pay to the lessor a royalty or rent, which depends on the amount of coal or other product mined, the lessee thereby, in the absence of any provision to the contrary, im-

pliedly obligates himself to begin the development of the coal, and the mining thereof, within a reasonable time after the execution of the lease. As to what may be regarded as reasonable time, however, depends upon the circumstances of the particular case."

The application of a cognate principle is discernible in Western L. & C. Co. v. Copper River L. Co., 138 Wis. 404, 120 N. W. 277. Horner v. Railway Co., 38 Wis. 165, contains these words: "(1) Although there are technical words, which, if used in a conveyance, unmistakably create a condition, yet the use thereof is not absolutely essential to that end, and a valid condition may be expressed without employing those words. (2) It is not essential to a valid condition that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with a breach of the condition."

Applying these abstract rules we say in the instant case: Where a mining lease is granted upon the consideration that the lessee shall observe the covenants and conditions thereof, and the lessee covenants to prospect the land and in case he discovers a mine pay the lessor rent, royalty, or tribute based upon the ore mined from such mine if discovered, the covenant to prospect the mine is in the nature of a condition, and the lessee must proceed with and persist in prospecting with reasonable diligence and continuity of effort. Was the delay of the lessee in the instant case unreasonable? In Norway v. Rowe, 19 Ves. 144, it was averred in the bill and apparently assumed to be correct by the court and counsel that by the custom of Cornwall suspension of operations by prospectors or adventurers for a year and a day was ground for forfeiture of their interest in the mineral land. McSwinney accepts this as proof of the custom of Cornwall in his excellent treatise on mines. In this age and country of greater hurry and activity, the limit of suspension of prospecting should without sufficient excuse certainly not exceed that. The finding of the learned circuit court, whose circuit includes the most ancient and active mining district in this state, also supports the conclusion that the delay in the instant case was unreasonable. We are, aside from authority and foreign customs, disposed to agree with this determination. We find no sufficient excuse for the delay in the fact that the lessee was without means to carry on the prospecting work. * * *

The decree of the court below must be so modified as to exclude from its confirmation of forfeiture all lands not described in the written lease of December 6, 1906, and, as so modified, affirmed.

Judgment modified and affirmed, with costs.

MUHLENBERG AND ANOTHER v. HENNING AND ANOTHER.

1887. SUPREME COURT OF PENNSYLVANIA.
116 Pa. St. 138, 9 Atl. 144.

COVENANT by Henry A. Muhlenberg and Hiester H. Muhlenberg against John Henning and James H. Maderia to recover two years' royalty under the provisions of a certain lease.

The plaintiffs having filed a copy of the lease, and an averment of the amount due thereunder, defendants filed an affidavit and a supplemental affidavit of defense, the allegations of which are stated in the opinion. Plaintiffs then took a rule for judgment for want of a sufficient affidavit of defense, which the court (HAGENMAN, P. J.) subsequently discharged, whereupon plaintiffs took this writ.

CLARK, J.[16]—This action of covenant was brought upon a contract under seal, denominated a "lease," and dated July 23, 1883, by the terms of which the lessors granted to the lessees the exclusive right, for five years, to all the iron ore contained in a certain tract of 50 acres of land therein described; in consideration whereof the lessees agreed to pay to the lessors for every ton "of clean, merchantable ore, raised, mined, and taken away by them, or their order, from the said premises, the price of thirty-five cents," etc. The lessees further agreed "to raise, mine, carry away, and sell at least fifteen hundred tons of iron ore annually, during the continuance of this lease, or, in default thereof, pay a royalty of $525 annually;" the lease to be forfeited at the option of the lessors, if, at the end of any year, $525, as rent or royalty, had not been paid during the year.

It appears by the several affidavits of defense that the lessees, after the execution of the lease, promptly entered into the possession, and, at an expense of $3,000, erected all the machinery and appliances necessary for the proper prosecution of the work; that they were fully equipped to mine, dig, and wash all the iron ore upon the tract; that, with the aid of practical miners, of large experience, they prosecuted their undertaking with due diligence for nine months or more, in a workman-like and skillful manner, but, after a full exploration and search, they failed to find sufficient ore to enable them to carry on and continue the operation as was contemplated in their contract; and, further, that the ore which they did find, and which the said tract contained, was of such inferior quality that, when properly and carefully mined, washed, and prepared for market, in the usual manner, it was not "merchantable iron ore;" that the lessees communicated these facts to the lessors, and the operation of the mines was thereupon discontinued, but the machinery was suffered to remain, with the verbal understanding between the parties that, as long as

[16] Part of the opinion is omitted.

the mine was not operated, for the reasons stated, the royalty would not be required.

On April 1, 1886, this suit was brought to recover two years' royalty, with the interest thereon. The question for our consideration is whether or not the affidavits exhibit a good defense to the whole or any part of the plaintiff's claim.

The lessees were, without doubt, bound to prosecute the work without delay. It was their duty to search for and find the ore, and to ascertain its quality; and if ore in sufficient quantity, and of proper quality, could be found, they were held to raise 1,500 tons of it annually. Failing in either, they were bound for the minimum stipulated royalty of $525 per year. *Johnston* v. *Cowan*, 59 Pa. St. 275. If, however, it was established by actual and exhaustive search that, at the time of the contract, there was, in fact, no ore in the land, or no ore of the kind contracted for, it cannot be pretended, upon any fair or reasonable construction of the contract, that the lessees were nevertheless bound for the "royalty" of $525 annually; for the payment of the royalty was undoubtedly based upon the assumption of the parties that ore of the quality specified existed there. The subject of sale, it is true, is the exclusive right to mine the iron ore. But for that right the lessors were to be compensated according to the number of tons of "clean and merchantable iron ore" mined; the lessees undertaking to mine 1,500 tons annually, "or, in default thereof," to pay $525 royalty; and how could the lessees be *in default* in mining 1,500 tons annually, if there was no ore to mine? We are not to construe the contract to require the lessees to perform an impossible thing. The $525 is not a penalty. It is the price of the ore. The grant was of the ore in place, and, if the subject-matter of the contract fail, the price is not payable. If there was no ore to mine, there could be no royalty to pay. As well might the vendor of meat which proved to be putrid, or of a cargo of corn which had no existence, enforce collection from his vendee. We think the manifest meaning or intention of the parties, as exhibited by the terms of the contract, was that 1,500 tons "of clean and merchantable iron ore" were to be mined in each year, if that quality and quantity of ore were there found, and that the contract, by necessary implication, must be so construed.

There was no guaranty, it is true, on the part of the lessors, that any ore was to be found in the land, or that the operation would be profitable to the lessees, who certainly entered upon the enterprise at their own risk. The lessees, therefore, could have no recourse upon the lessors for their outlay, in the event of failure. *Harlan* v. *Lehigh Coal, etc., Co.*, 35 Pa. St. 287. On the other hand, if the latter were to bring an action against the former, upon the covenant to work the mine, equity would interfere to prevent a recovery. *Ridgway* v. *Sneyd*, Kay, 627. But the contract having been made upon the assumption of the parties that ore of the quality mentioned ex-

isted in the land, when it becomes manifest that the parties were mutually mistaken, the contract obligation ceases. It may turn out at the trial, of course, that the ore was in fact merchantable; but, as the case is now presented, we must assume the facts to be as stated in the affidavits of defense.

This view of the case accords with, and is fully sustained by, the ruling of this court in *Kemble Coal & Iron Co.* v. *Scott,* 15 Wkly. Notes Cas. 220. * * *

The authorities cited by the plaintiff in error are inapplicable to the case under consideration. * * *

In *Jervis* v. *Tomkinson,* 1 Hurl. & N. 195, the lessees entered into the covenant knowing the exact state of the mine, and with that in view covenanted positively and absolutely to get the quantity of 2,000 tons of salt in every year, or pay for the deficiency at the end of it; and therefore, whether they could be got easily or with difficulty, or even whether they existed at all, was held to be immaterial, in the case of an absolute and unqualified covenant. While in *Marquis of Bute* v. *Thompson,* 13 Mees. & W. 486, the plain intention of the parties, as manifested on the face of the contract, was that the rent stipulated should be paid whether there was coal or not. There was an express provision in the alternative to pay the rent. See *Clifford* v. *Watts,* 18 Wkly. Rep. 925.

We are clear in our convictions that the affidavits of defense in this case are such as should send the case to a jury, and therefore the writ of error is dismissed, at the cost of the plaintiffs, without prejudice, etc.[17]

[17] In Brooks v. Cook, 135 Ala. 219, 34 So. 960, 962, where the lease was of iron ore, Tyson, J., for the court, said: "The grant was of the ore in place, and, if the subject-matter of the contract failed, the price is not payable. Indeed, it is expressly stated in the lease that the lands designated therein as belonging to plaintiffs, and which the defendants are granted the right to mine, are 'supposed to contain iron ore.' When this recital is taken in connection with the fact that the plaintiffs were to be compensated for the right and privilege of mining this ore by a royalty, we do not see how it can be held otherwise but that the contract was made upon the assumption of the parties that ore existed in the land. This being true, when it became manifest that the parties were mutually mistaken, the contract obligation ceases."

CHAPTER XI.

TENANCIES IN COMMON AND MINING PARTNERSHIPS.

Section 1.—Tenancies in Common.

WILLIAMSON ET AL. v. JONES ET AL.

1897. SUPREME COURT OF APPEALS OF WEST VIRGINIA.
43 W. Va. 562, 27 S. E. 411.

BILL by Eliza Williamson and others against J. T. Jones and others. Decree for complainants, and defendant Jones appeals. Reversed.

BRANNON, J.[18]—* * *

We start with the fact that Jones was owner of three undivided tenths in fee in possession, and owner of a life estate for the life of Mrs. Williamson in the remaining seven-tenths, and the plaintiffs owners of the remainder in fee in those seven-tenths; after the end of the life estate, a vested remainder; and, in this condition of right to the land, Jones [took exclusive possession, claiming the whole,] bored 23 wells upon the land, and produced from May, 1892, to December 21, 1895, 622,281 barrels of petroleum oil therefrom, valued at $500,298. Did he have right to bore for this oil? He claims that he had, and that every barrel of it is his, without liability to account to the plaintiffs; while the plaintiffs claim that he had no right to bore and produce this oil, but, having done so, he must account to them for full seven-tenths. Did Jones, as tenant for life, have right to extract this oil? He had not. Petroleum oil, in its place in the land, is a part of the land itself, just as are coal, timber, and iron. Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271; Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436. A tenant for life cannot do anything entailing permanent injury to the estate of the remainderman or reversioner. He cannot, therefore, dig for gravel, lime, clay, stone, or the like; cannot open new mines for minerals. 1 Lomax, Dig. 54. If he take clay to make brick, not for repair of buildings, but for sale, it is waste. University v. Tucker, 31 W. Va. 622, 8 S. E. 410. It is the duty of the life tenant to protect the land from waste or injury even from others, and he must abstain from so

[18] Parts of the opinion are omitted.

doing himself. 1 Washb. Real Prop. p. 116, § 24; 1 Lomax, Dig. 57. Therefore, when Jones himself committed waste by boring for oil, he was a wrongdoer, so far as concerns his life estate. The remainder-men could sue him in an action of waste, as at common law under the English statute of Marlbridge, or in action of trespass on the case under chapter 92 of the Code, and recover the full value of their seven-tenths.

It is sought to show that Jones, as life tenant, had right to all the oil, by the case of Koen v. Bartlett, 41 W. Va. 559, 23 S. E. 664, but that case will not sustain this claim. It asserts only that a tenant for life may use the land and its profits, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during its existence. There the owner in fee had made a lease for oil, with a royalty as rent, and then conveyed the fee, reserving a life estate, and it was held that he, as life tenant, was entitled, as against the remainder-man, to the royalty; but there the owner had authorized the boring for oil, and the conveyance was subject, in terms, to the lease, and, though the boring had not produced wells open at the commencement of the life estate, they were bored, under authority, during its continuance. We held that a mine bored in the period of the life estate, under prior authority, was to be deemed as if an open mine at the commencement of the life estate. It is established that an open mine may be worked to even exhaustion by the life tenant. Crouch v. Puryear, 1 Rand. (Va.) 258; 1 Lomax, Dig. 54. The offense of waste consists in the first penetration and opening of the soil, and it is not waste to dig in mines or pits already open, which have become part of the annual profit of the land. Tayl. Landl. & Ten. § 249a. When Jones penetrated the soil, he did so without warrant from his life tenancy, and without warrant from the creator of the life estate. There was no open well, no antecedent authority to bore one. Koen v. Bartlett is no help for him. It may occur that, if Jones could not bore, his life estate would be worthless to him. The oil might be drawn off by wells on an adjoining tract. As life tenant, he was entitled to none of it. Such is the quality of that estate.

Having seen that Jones, as life tenant, could not take this oil, we shall next inquire whether his right as owner in fee of three-tenths gave him right to do so. Jones was a tenant in common with the owners of the seven-tenths. By the old law one tenant in common was not liable to another for waste; but our Code of 1891 (chapter 92, § 2) has remedied this unreasonable rule by making tenants in common joint tenants and parceners liable for waste. 1 Lomax, Dig. 499; 2 Minor, Inst. 620. Then we have simply to inquire whether the extraction of oil is waste, and under authorities above given we must answer that it is. Those acts which would be waste in a tenant for life would be between tenants in common. As the statute uses the law word "waste," we must give it the legal

meaning as applied to tenants for life. Elwell v. Burnside, 44 Barb. 447. Chapter 100, § 14, Code 1891, gives an action of account between tenants in common for receiving more than his just share,—that is, more than his just share of rents and profits from the legitimate use of land; but this has no reference to waste. It does not license waste. There stands section 2, c. 92, branding it as a tort, and giving action for it, and it applies though one claim title to the whole, and commit waste. 28 Am. & Eng. Enc. Law, 895. As owner of three-tenths in fee, Jones could not bore for oil, any more than a stranger, because the act, whether done by a co-tenant or stranger, is a wrong. For this purpose he was a stranger, so far as the wrongful character of the act is concerned. He had right to possession for residence or other ordinary use working no injury to the inheritance, and therefore we term his act waste, not technically trespass as done by a stranger. "Waste is an injury to the freehold by one rightfully in possession. This marks the distinction between waste and trespass." 1 White & T. Lead. Cas. Eq. 1011. But the nature of the act is a tort in both cases; the same in both. Of course, a stranger would be liable for trespass; or, if he converts the oil from realty into personalty, the injured co-tenant may waive the trespass, and go for the value of the oil, or for the money for which the trespasser sold it. Indeed, Jones claimed to own the whole land, repudiated any co-ownership with the Hickman heirs, and thus assigned to himself the position of a stranger. This, however, only strengthens the argument that he is to be regarded a wrongdoer against the owners of the seven-tenths, as the statute makes him a wrongdoer though he were regarded as a tenant in common. It is therefore immaterial to define his exact caste; whether we regard him as a tenant in common or stranger it is the same. If oil wells had been opened, Jones, as co-tenant, might set up claim under his three-tenths interest to work them, and take all profits under some cases (McCord v. Mining Co. [Cal.] 27 Pac. 863); though I should think he would have to account under section 14, c. 100, Code. Rust v. Rust, 17 W. Va. 901. That would be no wrong; not waste. His life tenancy would give him the right to take all the oil. But there were no oil wells on it, nor any precedent authority to open any. He first pierced the soil in quest of this fluid of fabulous wealth. He had no right to pierce it to get even his three-tenths of the oil.[19] If he chose to do so, of every gallon seven-tenths belonged to the owners of the seven-tenths in the land, because it had been a part of their soil. These considerations repel all idea that as owner of the fee in three-tenths he could penetrate the soil, and convert to his sole use, without accounting, all the oil raised. * * *

This shows that Jones, as owner of the life estate intervening before the seven-tenths would be vested in possession could not keep

[19] See Pyle v. Henderson, ante, p. 693.

the oil. "Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect, and he may pursue and reclaim it wherever he may find it." Hughes v. United Pipe Lines, 119 N. Y. 423, 23 N. E. 1042. It may be said that these doctrines would leave the part owner powerless to get any benefit from the oil. If so, so it must be as a quality of his estate. But it is not so; for, if he wished a partition, he was entitled to it, and thus could bore on his separate share, and take the oil on it, and perhaps drain all from the other, and hold it acquit of account for it; and, if he did not wish partition, oil being capable of loss from wells on lands near by, perhaps he could ask a court of equity to allow him to bore, and take his share of the oil, and pay the balance to the remainder-man, like that jurisdiction exercised by equity to direct timber in a state of decay to be cut down for the benefit of those entitled to the inheritance, if it would do no damage to the life tenant, compensating him for the use of the land. Here Jones was himself the life tenant. 1 Lomax, Dig. 60; Story, Eq. Jur. § 919. Thus the owners of the seven-tenths in the land had plain legal title, and their rights are such as above given to seven-tenths of the oil, unless something not yet considered debars them from such rights. * * *

As above stated, Jones had no right to any of the oil as life tenant. As owner of the three-tenths of the land, he had no right to produce the oil, and his act in so doing was one of waste. When he did extract the oil, seven-tenths of it was by right and title oil of the plaintiffs, the very oil itself, because taken from their land. Jones converted this, their property, to his own use. They are entitled to recover the money he received for it, if ascertainable; if not, its value. * * *

It is claimed for Jones, if he is not allowed all the oil, he should pay only one-eighth of the seven-eighths as royalty. If he had worked already open wells, it might be more plausible to say so; but he first penetrated the soil as a wrongdoer, in a legal view. If an open well, it would be lawfully used by a life tenant, and probably by a tenant in common, as one mode of enjoyment of his share. I say probably. That matter is not before us. Rust v. Rust, 17 W. Va. 901, holds that where one tenant in common occupies the whole property he is liable to co-tenants for a reasonable rent for it in the condition it was in when he took possession. This is approved in the opinion in Dodson v. Hays, 29 W. Va. 601, 2 S. E. 415. This doctrine follows Early v. Friend, 16 Grat. 21. In the two West Virginia cases the use of the land was for ordinary purposes, not extracting minerals, and the occupying tenant had right to occupy and farm the land. The Early Case was the use of a salt well opened before the commencement of the co-tenancy, and perhaps the use of the salt water in making salt by the occupying tenant was lawful, as the use of the land in the condition it was in when he went

upon it, and as it had been used by the ancestor. And besides, between him and some of the co-owners, there was a stipulated rent, which the judge gives as a reason for the charge of a rent; and besides he says the occupying co-tenant and the others regarded it as a renting. And the court refrained from laying this down as an inexorable rule, saying there might be cases calling for an account of rents and profits. The case in hand is a case of a different hue; not the case of one cropping the land in that legitimate use which a tenant in common may make of the land; not use of open salt or oil well, which likely can be used by one tenant as it had been before; but when one pierces the earth, and takes from its place oil that is a part of the realty,—an act not of legitimate use, but destruction and waste of the inheritance of the others. Almost an exactly similar case to the one in hand is Ruffners v. Lewis' Ex'rs, 7 Leigh, 720, where persons claiming adversely to plaintiffs were held tenants in common with them, and had sole occupation, and had discovered salt, and bored wells. Great controversy arose as to the mode of charge against them. Held chargeable, not with rental, but rents and profits, if any made, with credit for expenses and improvements. * * *

It does seem to me on authority and reason that an account of rents and profits is the true basis. I cannot see how, where there is no lease, no contract, no tacit understanding between the parties, no past mode of business, but one not the true owner has used and received rents and profits from land of other people, you can charge an annual rental, and not their fraction of rents and profits received by the occupier.

What is to be done with the money to which the plaintiffs are entitled? Does it go to them at once, or is it to be put at interest, and Jones, as life tenant, get the interest on it, during Eliza Williamson's life, or a certain sum for its present worth?

As above shown, by reference to McSwinney on Mines, it goes at once to the plaintiffs, and Jones has no right to interest on it during the life estate: (1) Because he is, in a legal point of view, a wrongdoer, and, if given interest, this would give him the benefit of his own wrong. * * *

2. Jones is not entitled to interest, because he did not own a drop of the oil belonging to the owners of the 7-10. He is not entitled to the oil, and, of course, is not entitled to the income of interest from its proceeds. * * *

This decision may be burdensome to Jones, who appears to be a man of great energy, business capacity, and merit, and I will not conceal the wish that we could, consistently with law, be more favorable to him; but we are bound by the law, seemingly very plain, and in itself logical and well established. The plain and simple showing of the voluminous record and contestation in this case is that he has taken sole and exclusive possession of land belonging

in greater fraction to others, and of his own accord drawn from it vast quantities of oil belonging to them in clear law, and sold it, and reaped rich return, and the true owners demand their own under the law. If he was mistaken in his own judgment as to the title, or from misadvice, it is a misfortune that is to be regretted, but for which the plaintiffs are not legally responsible; and if he knew of the defect of title, and he surely had enough to warn him and put him upon inquiry before embarking in large expenditures, it seems only rashness, or rash speculation. In fact, however, the returns bored the wells after the first. * * *

As stated above, the charge against Jones is to be by rents and profits, not by annual rentals; but this presents a question which has given me great perplexity, and this is the question, what shall be credited to Jones against rents and profits?—especially whether he shall be repaid expense of boring wells. Where one man, in possession under a hostile defective claim or title, makes permanent improvements, the common law gave him no pay for them, as he voluntarily put them upon the land of another; but our Code (chapter 91) gives compensation therefor if, when the improvements are made, there is "reason to believe the title good under which he or they were holding." As shown above, warning was given Jones by Tennant, his agent, and by the record under which he purchased, of the rights of the plaintiffs, and our court has held that this notice precludes allowance for improvements. Hall v. Hall, 30 W. Va. 779, 5 S. E. 260; Dawson v. Grow, 29 W. Va. 333, 1 S. E. 564; Cain v. Cox, 29 W. Va. 258, 1 S. E. 298; Id., 23 W. Va. 613. Good faith would seem to be the test, but these cases affect Jones, legally speaking, with a notice repelling good faith; and yet there is good ground for saying that, as a matter of fact, Jones, from misadvice as to the law, thought he was buying a good title. People generally think that a court sale always gives good title, whereas often it does not. Therefore, viewing Jones as an adverse claimant, or as one who, being really a tenant in common, yet takes sole possession, denying the claim of all others and claiming the entirety, and taking exclusively all rents and profits, it is difficult to accord him compensation consistently with dry law. Even where one joint tenant or tenant in common, not claiming the whole,—not denying his fellow's right,—makes permanent improvements, without his fellow's consent, he cannot charge him, nor hold exclusive possession until reimbursed by rents and profits. * * *

If Jones, by mistake of law, was led to believe that the court sale conferred good title, that will not serve him. Opinion in Hall v. Hall, 30 W. Va. 785, 5 S. E. 260; Harner v. Price, 17 W. Va. 523; 10 Am. & Eng. Enc. Law, 248, note.

But there are other considerations. We are in a court of equity, which often departs from dry legal rules in the interest of substantial, even-handed justice. It does not seem that there is any inflex-

ible, iron-clad rule in equity in this matter, unless our statute imposes it. This is not the case of a suit to impose upon the co-owner a personal liability, or a liability on his land, for improvements, nor to continue in possession till future profits shall reimburse them; but it is a case where the plaintiffs ask an account to charge Jones with rents and profits, and he seeks to set off improvements. Yea, more, it is a case where the plaintiffs ask to receive the benefit of the property in its improved condition,—to have the benefit of those improvements; that is, they ask pay for oil flowing through these very wells, without which wells there would not be a gallon of oil for them or for Jones. The law is well settled that in account of rents and profits you must charge the party for the property in its condition before his improvements, and not with the profits of his improvements (page 789, 30 W. Va., and page 265, 5 S. E.; Freem. Co-Ten. § 262; Code, c. 91, § 2; Moore v. Ligon, 30 W. Va. 155, 3 S. E. 576; White v. Stuart, 76 Va. 566; Early v. Friend, 16 Grat. 21; Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856). This is a strong factor in the solution of this question. The plaintiffs demand their oil, solely the fruits of the pluck and courage and energy of Jones, in hazardous enterprises, which might have involved him in ruin. They came into a court of equity, asking that we accord them their legal rights, and they are given unto them, but it is an adage there that he who asks equity must himself do equity. He cannot, in every instance, eat the fruitage without sharing in the burden of the planting. I repeat that no immovable rule binds a court of equity in this matter. Freeman's Co-Tenancy & Partition (section 279) says: "Improvements made by one co-tenant, independent of any agreement so to do, may sometimes be proper matter to be considered in taking an account; but under what circumstances, and to what extent, improvements may be considered in taking an account between co-tenants, cannot be stated with desirable precision. It is probable, however, that they will not be made a subject of compensation, unless they are of a usual character and necessary for the ordinary and conceded use of the property." There is a difference between the case where the party making improvements seeks, as an actor or plaintiff, to set up a debt against the co-owner or his land for improvements, and one where the co-owner calls on the other to account for rents and profits; for in the former case, generally, the party will fail, and in the latter, if the party has acted in good faith, he will be allowed to set off improvements. See opinion in Effinger v. Hall, 81 Va. 103; 3 Pom. Eq. Jur. § 1241. There is some authority that where one has in good faith put improvements on land he may, by a suit of his own, charge the land. Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875. But unless there was an agreement or circumstances tantamount, or fraud, I would doubt this. Clearly, a consent to such improvement binds the party, and creates a lien on the land and a personal obligation. Houston v.

McCluney, 8 W. Va. 135. (It is proper to remark that defendants claiming improvements under chapter 91, Code, may recover beyond rents and profits, if in good faith claimants.) I repeat that this suit is to charge Jones with rents and profits, and it is not inconsistent to allow him as a set-off expenses of production, including not merely handling the oil, but the cost of boring productive wells, under the particular circumstances of the case, namely, that by reason of the energy and risk of Jones he developed this hitherto worthless land into an oil field of almost amazing wealth, yielding far beyond the cost of development, and leaving to go to the plaintiffs large returns. If we give Jones his expenditures, still a large amount goes to the plaintiffs; otherwise Jones loses them, and this would violate a rule of equity which, translated from the Latin, says that "by the natural law it is not right that any one should grow rich by the detriment and injury of another." Much authority can be shown to support this doctrine in addition to that given above. Story, Eq. Jur. § 1236, note; Corcoran v. Corcoran (Ind. Sup.) 21 N. E. 468; Stewart v. Stewart (Wis.) 63 N. W. 886; 11 Am. & Eng. Enc. Law, 1107. But for Jones' acts, this oil would not have been produced, so far as we can see; but for him perhaps this oil now enriching the plaintiffs would have been lost to them by being drained off by wells on adjoining lands. Under these circumstances, equity cannot be blind to the argument that Jones' acts have been to the plaintiffs a blessing, not even in disguise, but plain and apparent. We cannot be deaf to the argument that the labor, enterprise, and business ability of this man, though technically in the wrong, appeal to a court of equity with strong call for liberality so far as to repay him by set-off all outlay in producing oil, including cost of productive wells, and we resolve any doubt by so holding. A debt for such improvement could not be made against the plaintiffs, nor would we say that all their oil could be thus absorbed; but here is a large surplus.

In conclusion, I must not omit to say that our holding in allowing cost of wells is fortified by the precedent of Ruffners v. Lewis' Ex'rs, 7 Leigh, 720, where parties, holding adversely to the plaintiff, were treated as tenants in common with them, and as they had bored wells, and discovered and produced salt water, were allowed improvements, including cost of wells, as set-offs against rents and profits, and even for abortive wells, the court saying: "The plaintiffs, if they will have advantage from their successors, must be content to share in their disappointments and failures. He who takes the profit must share the burden." True, in that case, the court found that the parties acted under fair belief of good title, so that their good faith could not be doubted. Here, under cases above cited, we cannot find that Jones is unaffected by notice of the plaintiffs' right; but for which I should not, for a moment, entertain any hesitancy in allowing him cost of wells. I have above treated the wells as if perma-

nent improvements. Perhaps they are not to be so treated, but rather as a part of the cost of production, like a tank for keeping the oil when produced. An allowable improvement must be that which adds to—enhances the value of—the land permanently for general uses; but a well or derrick adds nothing permanently, at least for general use, and usable only for producing oil,—the mere means or instrument of production. If this be so, there is less question about allowing their cost as but an item in the cost of production, though I have discussed the subject under the law relating to improvements. Treating cost of productive wells as cost of production of oil, we may say that, though Jones had notice of plaintiffs' right, yet he should be charged with net rents and profits, not gross,—with what he actually received,—otherwise equity inflicts a penalty. As an abortive well neither enhances the value, nor yields anything to the true owner, he ought not to be charged with its costs. I confess that, under our statute and decisions, I have hesitancy in this holding; but other members of the court do not, and feeling that Jones, under the circumstances, has strong claims to such allowance, I concur with other members in so holding. But the law ought to be clearly and accurately understood in so important a matter, and I want to state for myself what I understand to be the law, under our statute and decisions. An ejected defendant, who made permanent improvements valuable to the estate, not when he merely believed his title good, but when there was reason to believe it good, may by filing his claims under section 32, c. 90, and section 1, c. 91, Code 1891, not only set off the value of such improvements against rents and profits, but recover any balance by which their value may exceed rents and profits; but if, when the improvements were made, there was not reason to believe the title good, he cannot even set them off against rents and profits; and notice either actual or constructive, of the defect of the improver's title and of the rights of others will preclude allowance for such improvements. He is precluded because he acts in bad faith or negligence, and cannot take away even the rents and profits of another by improvements the latter did not sanction, which by the common law became part of the land and belonged to the true owner, no matter how they came there, and which the statute allowed only to one legally without blame. The wrongdoer is not given the benefit of his wrong. Reversed and remanded.

WOLFE ET AL. v. CHILDS ET AL.

1908. SUPREME COURT OF COLORADO. 42 Colo. 121, 94 Pac. 292.

ERROR to District Court, Lake County; Frank W. Owers, Judge.

Action by Minnie B. Childs, administratrix of Charles D. May, deceased, against one Zobel and others, alleging a tenancy in common in the St. Louis lode mining claim, and that defendants Zobel, Sulli-

van, and other defendants had wrongfully extracted ore therefrom, and praying for an accounting. James S. Wolfe and others as co-owners intervened. There was a judgment granting insufficient relief, and the interveners bring error. Reversed and remanded.

GODDARD, J.[20]—* * *

2. Zobel, as owner of an undivided interest in the mine, under an agreement with A. B. Sullivan and the Julia L. Real Estate, Loan & Investment Company, but without the consent and after the refusal of the interveners [as co-owners] to join with him therein, operated the mine from the 1st of May, 1898, until October 31, 1902, and leased parts of the property containing ore bodies to certain lessees. As to the character of the work done by him, and the amount expended therefor, and the value of the ore extracted by him, and the amounts received as royalties, the court finds as follows: "(14) That said Zobel, prior to the 1st day of September, A. D. 1901, did considerable development work upon said property in the way of driving drifts, tunnels, and winzes for the purpose of exploiting and developing the same. * * * (15) That subsequent to the 12th day of April, 1898, the said Zobel had expended upon said property, for development work as aforesaid, the sum of $4,969.50; that part of said expenditure was for necessary work to the actual mining of ore aforesaid; that part of said work was non-productive, and done on a part of the property remote from where the ore sold was mined, but was legitimate development and prospecting work in a part of said property that has yielded no income; that said Zobel performed personal services and expended labor and time in the course of said work of a reasonable value of $2,180.90." And it further finds that Zobel received from the ore extracted by himself and in royalties the sum of $9,953.06, and finds, as a conclusion of law, that he (Zobel) is entitled to retain the proceeds of the ore taken from the mine the amount of $4,969.50 expended as aforesaid and $2,180.90 for his personal services, and that the balance of $2,847.70 only should be credited and paid to the respective interests in the mine; the amount so credited to the interveners being the sum of $355.97. The interveners contend that the conclusion of law announced by the court upon the facts as found by it is erroneous, for two reasons: (1) That a portion of the work, as the court expressly finds, for which such expenditure was made, was "nonproductive and done on a part of the property remote from where the ore sold was mined"; that it was simply prospecting, that resulted in no improvement of the property or benefit to the interveners, and was a character of work for which Zobel was entitled to no credit. (2) That it erroneously allows Zobel compensation for his personal services.

[20] The statement of facts and a part of the opinion are omitted.

We think it is clear, from the finding of the court below, that a portion of the expenditure for which Zobel was allowed credit was made in doing work for which he was not entitled to contribution from these interveners. As was said in Stickley v. Mulrooney, 36 Colo. 242, 244, 87 Pac. 547, 548: "It appears to be well settled that one co-owner, without the consent of the other co-owners, cannot demand from the co-owners who have not joined with him, or in some way given their consent to the development or prospecting in mining property, remuneration for expenses incurred in so prospecting or developing the common property." While the operating tenant may, in case he is called upon to account for profits, set off as against a non-operating tenant the cost of the necessary improvements, he must show that such improvements were necessary, and added to and enhanced the value of the common property. A portion of the expenditure for which credit was allowed Zobel was, as we have seen, not of this character. What portion it is impossible to determine from the findings of the court; it appearing therefrom that part of the expenditure was for work which resulted in the development of the ore body which was opened at the time interveners acquired title, and in extracting such ore, which would be a legitimate offset, and a part was for prospecting and developing other parts of the mine for which he was entitled to no contribution from the interveners. It is also well settled that tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property, in the absence of a special agreement or mutual understanding to that effect. 17 Am. & Eng. Enc. Law, p. 688, subd. 6; Gay et al. v. Berkey, 137 Mich. 658, 100 N. W. 920; Dunavant v. Fields, 68 Ark. 534, 60 S. W. 420; Sharp v. Zeller, 114 La. 549, 38 South. 449. It is manifest, therefore, that the court erred in allowing Zobel the full amount of his expenditures for work and development, and compensation for his personal services.

For the foregoing reasons, the judgment is reversed, and the cause remanded.

Reversed and remanded.

ZEIGLER ET AL. V. BRENNEMAN ET AL.

1908. SUPREME COURT OF ILLINOIS. 237 Ill. 15, 86 N. E. 597.

BILL by George Zeigler and others against L. A. Brenneman and another. From a decree in favor of a part of the complainants, defendants appeal. Reversed and remanded, with directions.

This is an appeal by L. A. Brenneman and A. T. McDonald from a decree of the circuit court of Crawford county which cancels and

sets aside as clouds upon the title of Edgar D. Zeigler, Ernest Zeigler, Anna Price, and Charles A. Rapp a lease executed to appellants by George Zeigler and Rachel Zeigler, his wife, and the assignments thereof, upon 18.825 acres of gas and oil land located in Crawford county. The decree also enjoins appellants or their agents or servants from in any manner interfering with the said Charles A. Rapp or his assigns in drilling or operating for oil or gas on said premises, or from entering thereupon for the purpose of prospecting or drilling for oil or gas, or from doing any other act tending to the production of oil therefrom. * * *

It appears from the record that on February 11, 1865, George Zeigler and Martha V. Zeigler, his first wife, each became the owner of an undivided one-half of the land in question. About nine years before the filing of the bill Martha V. Zeigler died seised of her interest in this property, leaving no will, and leaving surviving her her husband and Edgar D. Zeigler, Ernest Zeigler, and Anna Price, her children and only heirs at law. After her death her husband continued to occupy the premises, and up until a short time prior to the beginning of this suit managed and controlled the same as if they were his own property. On June 9, 1905, George Zeigler and Rachel Zeigler, his second wife, executed a gas and oil lease to the premises in question to one W. W. Seybert for a term of three years, and so long thereafter as oil or gas was produced from the land and royalties and rentals paid by the lessee therefor, giving to the said Seybert or his assigns the exclusive right to mine for and produce oil and natural gas from said tract of land. Seybert's rights passed to defendants, and Seybert's lease and the instruments effecting its transfer were recorded as recited by the decree. During the month of February, 1907, appellants began drilling on the land, and about March 11, 1907, completed a productive and paying oil well. A pump was placed in the well, tanks erected on the ground, and the well was operated by them until the beginning of this suit, when a receiver was appointed, who has since operated the well. Shortly after the completion of this well appellants hauled material on the ground to begin the construction of a second well. After the second rig had been erected by appellants Edgar D. Zeigler gave notice to their agent, who was actually operating the land, that he and his brother and sister had an interest in the land and warned the agent that appellants should not operate further. On June 25, 1907, George Zeigler, Edgar D. Zeigler, Ernest Zeigler, together with their wives, and Anna Price and her husband, attempted to execute a gas and oil lease to the premises in question to Charles A. Rapp for a term of 10 years, and as long thereafter as oil and gas, or either of them, was produced from the land. * * *

Scott, J.—(after stating the facts as above).[21] George Zeigler

[21] The statement of facts is abbreviated.

and Martha V. Zeigler, his first wife, owned each an undivided one-half of the real estate covered by the oil and gas leases here involved as tenants in common. Upon the death of the wife, intestate, her title in the land passed to their three children, burdened with the dower right of the husband. At the time of the execution of the Seybert lease George Zeigler was, as he had been for many years, in the sole possession of the real estate, claiming and apparently believing himself to be the holder of the entire title. The heirs of Martha V. seem to have shared his belief as to the condition of the title. After the lease had been assigned to appellants, they, with the knowledge of the three children, operated the land for oil and developed a paying well. Up to that time the children made no objection to appellants' proceedings, but by their silence acquiesced in what was being done. Shortly after a paying well was brought in by appellants, however, the children served notice upon them to the effect that they owned an interest in the land and warned appellants to proceed no further.

It is contended by appellants that these children, by their silence and acquiescence while appellants expended large sums of money and demonstrated the great value of the property, are estopped to assert, as against the appellants, their title to the premises or to object to appellants operating the land for oil. There is evidence which tends to show, and the court found, that these children were ignorant of the fact that they owned any interest in this land until after appellants' well was brought in. With this finding of fact we are not disposed to interfere. Within a reasonable time after they so ascertained that they owned an interest in the land, they gave notice to appellants. No estoppel arises against them, because during the time of their silence they were ignorant of the fact that they owned an interest in the land. Mullaney v. Duffy, 145 Ill. 559, 33 N. E. 750; Bradley v. Lightcap, 202 Ill. 154, 67 N. E. 45.

The parties to this litigation agree that one tenant in common may not operate for oil against the protest or without the consent of the other tenants in common. Appellants contend, however, that the lease from George Zeigler to Seybert was binding, as between the parties thereto, so far as the interest of George Zeigler in the oil and gas was concerned; while appellees' position is that the Seybert lease, having been made by one tenant in common without the other tenants in common joining therein, is wholly and entirely void so long as the lands remain undivided, and that during that time the owners of the land, including the lessor of appellants, may have the land operated for oil and enjoy the profits precisely as though the Seybert lease had never been made, but that in the event of a partition of the land, then the Seybert lease will become operative, and give to the holder thereof the sole right to operate for oil the portion of the real estate set off to George Zeigler.

Appellees by their brief quote and rely upon section 198 of Freeman on Co-Tenancy, which in our judgment states the law correctly, in these words: "A conveyance of the minerals in a tract of land, reserving his interest in the land itself, made by a co-tenant to a stranger, is regarded as void as against the co-tenants of the grantor, 'because it is an attempt to create a new and distinct tenancy in common between one co-tenant and the others in distinct parts of the common estate, which is contrary to the rules of law.'"

The lease is void as against the grantor's co-tenants; that is to say, in determining their rights in the property, no consideration is to be given to the existence of that lease. But it does not follow therefrom that it is of no effect as between the lessor and the lessee, even while the premises remain undivided. On the contrary, as between them it is just as valid as a lease of property owned entirely by the lessor. Freeman on Co-Tenancy and Partition, § 253. The law is that one tenant in common may not prejudice the rights of his co-tenants by a conveyance of any specific part, or of any interest, right, or license in any specific part, of the common property, but such a conveyance is valid as against the grantor, at least by way of estoppel. It is only where, and as far as, it comes in conflict with the interests of the co-tenants, that it is void. Fredrick v. Fredrick, 219 Ill. 568, 76 N. E. 856; Finch v. Green, 225 Ill. 304, 80 N. E. 318. In the present case, after the execution of the lease to Seybert, he and George Zeigler together held and possessed all the privileges, right, title, and interest in the land, including the oil and gas, that George Zeigler had before possessed, and the rights of George Zeigler's co-tenants remained precisely as they were before that lease was made. For example, if there was a partition of the land, then the Seybert lease would follow the interest of George Zeigler and be operative only upon the land set off to him, but, as between George Zeigler and Seybert, the latter had the same right in reference to operating the land for oil and gas that George Zeigler had prior to the execution of the lease, subject only to such burdens as were imposed upon Seybert by that instrument. It follows, therefore, that nothing was conveyed to Rapp by George Zeigler when he joined in the lease which Rapp took. Rapp has no greater right than if his lease was alone with the children of Martha V. Zeigler; the Seybert lease having been recorded and operations having been in full swing on the land under that instrument when Rapp took his lease. Neither of the lessees can maintain partition (Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53), and neither of them has the right to operate without the consent of the other (Murray v. Haverty, 70 Ill. 318), but either of the lessors can maintain partition, and in that way give to his lessee the sole right to operate for oil and gas in the portion of the land which may be set off to such lessor. If appellants and Rapp can agree upon the method by which this land shall be operated then they may operate it, one-half of the

oil going to Rapp, out of which he shall pay to each of the children of Martha V. Zeigler one-eighteenth part of that half as rent or royalty, the other half of the oil going to appellants, out of which they shall pay one-eighth part of that half to George Zeigler as rent or royalty. If, however, appellants and Rapp cannot so agree, neither can rightfully operate the land for oil unless some one of the tenants in common elect to have the land partitioned, in which event the rights of each lessee will attach to the land set off to his lessor or lessors. It is true that this view requires the children of Martha V. Zeigler or their lessee to agree upon the operation of the land for oil and gas, in case they so desire to operate while the land remains undivided, with appellants instead of with George Zeigler; but in law this is not to be regarded as prejudicial to their interests, as it cannot be said that George Zeigler's lessees will be less ready to join with the children or their lessee in operating the land than would George Zeigler himself.

No question respecting the dower right of George Zeigler has been presented by the parties.

The decree herein must be reversed and the cause remanded to the circuit court. Upon the cause being redocketed, the court will enter a decree providing that the lease from George Zeigler to Seybert and its assignments shall be canceled and set aside and for naught held in so far as they appear to convey any right, privilege, or license in and to the interest in the real estate which Martha V. Zeigler's children inherited from her, but leaving that lease and its assignments in full force and effect so far as they purport to convey any right, privilege, or license with respect to the interest of George Zeigler in the real estate. The decree shall also provide for the division of the oil already produced or its proceeds in the manner following:

The oil produced before June 25, 1907 (which was the date of the first lease made to Rapp), or its proceeds, shall be divided, without any charge for production, in the manner following: The one-sixteenth to George Zeigler, the seven-sixteenths to appellants, and to each of the three children of Martha V. Zeigler the one-sixth part. All the oil produced on and after June 25, 1907, down to the time of the appointment of the receiver, or its proceeds, without any charge for production, shall be divided in the manner following: To George Zeigler the three forty-eighths, to appellants the twenty-one forty-eighths, to each of the three children of Martha V. Zeigler the one thirty-sixth, and to Rapp the twenty forty-eighths part. The oil produced since the time of the appointment of the receiver, or its proceeds, after his disbursements and charges have been provided for out of the oil so produced, shall be divided in the same manner as the oil above mentioned which was produced on and after June 25, 1907, down to the time of the receiver's appointment. For the purpose of effecting such division of the oil, or its proceeds, as is hereby

awarded, the decree shall provide for any party hereto accounting and making payment to any other party hereto as may be necessary. If desirable for the purpose of effecting such division, additional proof may be taken, either in open court or upon a reference to a master. The costs of the circuit court other than the charges and disbursements of the receiver shall be adjudged one-half against the complainants and one-half against the defendants. The receiver shall be discharged, and the cause shall be stricken from the docket.

Reversed and remanded, with directions.

HALL v. VERNON et al.

1899. Supreme Court of Appeals of West Virginia.

47 W. Va. 295, 34 S. E. 764.

Bill by George W. Hall against W. V. Vernon and others. Decree for defendants, and plaintiff appeals. Reversed.

Brannon, J.—Hall brought a suit in equity against Vernon and others in the circuit court of Wirt county, alleging that a tract of 1,103 acres of land was, as to the surface, owned by Messrs. Doneho and Vernon, and that they had divided the surface; that the tract contained oil; that Messrs. Doneho, Vernon, and Hall owned the minerals in it, each a third; and that in a suit brought by Hall and Vernon against Doneho and others some years before there had been a decree of partition of the mineral ownership into lots 40 rods wide, and running to the exterior of the tract, which decree the bill in this case alleged had been obtained through fraud of Vernon, and it sought to annul the decree. The bill alleged that Vernon under this decree was taking oil from the lots assigned him, and using tanks, machinery, etc., belonging to all three persons, in his operations. The bill asked (and it was granted) an injunction restraining Vernon from operation oil wells on the tract, and from selling oil produced thereon, and restraining the pipe-line companies from paying Vernon for oil, or giving him certificates for oil deposited with them. A decree dissolved the injunction so far as it related to the land or the partition assailed, the court holding that the decree of partition had not been obtained by fraud. Hall appealed.

A majority of the court are of opinion that the decree of partition is void, and constitutes a cloud over Hall's title, which a court of equity will dispel by setting aside the decree. They take this position on the ground that oil and gas are fugitive, and that co-owners of them, not owning the surface, have a mere right to explore for them, and that it is impossible to partition the same in kind, owing to the

nature of oil and gas, and that a court cannot be called on to do an impossible thing, and has no jurisdiction to partition such a right by allotting gas and oil under certain sections of the surface. They hold that partition can be made only by sale and division of proceeds. Counsel cites the following authorities for that view: Gill v. Weston, 110 Pa. St. 312, 1 Atl. 921; Freem. Co-Ten. § 436; 15 Am. & Eng. Enc. Law, 607; Smelting Co. v. Rucker (C. C.) 28 Fed. 220; Conant v. Smith, 1 Aiken, 67; Bainb. Mines, 155; Lenfers v. Henke, 73 Ill. 405; Kemble v. Kemble, 44 N. J. Eq. 454, 11 Atl. 733.

I am of the opinion that there may be partition of oil and gas owned in fee separate from the surface, by allotting it by sections of the surface. True, one may not get any oil; but the chance is equal for all,—the best that can be done to avoid the sale of the property from its owners, which they have right to develop separately, as they have right to a partition in kind, if possible. Oil in place is realty, and therefore partition may be had of it where the tract is of considerable area. Freem. Co-Ten. §§ 433, 435; Hughes v. Devlin, 23 Cal. 501; Barringer & A. Mines & M. p. 54; Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955. Also, I think that, as equity has jurisdiction in partition, it can determine whether the subject is partible or not, and that, even if the decree be erroneous, it is not void in a legal sense.

The decree dissolving the injunction is reversed and the cause is remanded, with directions to the circuit court to enter a decree setting aside the decree of partition and perpetuating the injunction, and to proceed further as to matters of personal property before it.[22]

DENT, P. (concurring).[23]—The decree of partition in this case did not pretend to divide the solid minerals in the land, as none were shown to exist; and such a partition as was made would be inequitable and unjust if any such solid minerals existed, for it divided the land into 12 narrow strips, and allotted to each of the three owners several of these strips alternately, so that each owner's mineral properties were divided into several distinct strips, separated from each other by the strips belonging to the others. This would destroy the value of the solid minerals, for each party would have to work each tract of his separated minerals separately, instead of having them in one compact body. This decree is nothing more than a decree to divide the carbon oil, volatile minerals, gas, and gaseous vapors supposed to be or that might exist under the land in controversy by imaginary lines drawn over the surface of the land. Equity is natural justice. It is equality. It never does a vain thing, or enforces a void or impossible contract. Men may divide the moon by imaginary lines, but equity will not enforce their contract. They

[22] See Royston v. Miller, ante, p. 348.

[23] Parts of the concurring opinion of Dent, P., are omitted.

may divide the water in a well or in a brook, or the game in the forest, or the fishes in the sea, but equity will afford them no such relief. * * *

In the case of Kemble v. Kemble, 44 N. J. Eq. 454, 11 Atl. 733, it was held that "a partition of lands containing mineral deposits cannot be ordered if the location, extent, and value of such deposits cannot be ascertained." Franklinite Co. v. Condit, 19 N. J. Eq. 394; Grub v. Bayard, 2 Wall. Jr. 81, Fed. Cas. No. 5,849. If such is the case with solid minerals, how absurd it is to even talk of partitioning in kind oil or gas of whose existence, quantity, and location the court is in entire ignorance! And, if three owners of such a right can have partition in kind, they can transfer their interests to others, without regard to numbers, until they would be of such multitude that an attempted partition in kind would entirely destroy the use of the surface to the owner of the land, and yet there exist neither oil nor gas to be partitioned. Such a partition as was attempted to be made in this case was a mere nullity, as it partitioned nothing; and yet it operates as a cloud on plaintiff's rights, in fraud of which it was procured by the defendant Vernon. It being so plainly in excess of the powers of a court of equity, it was proper to set it aside on motion, petition, or in any other way its illegality could be presented to the court from which it was procured, without the necessity of resort to an appeal. It was not only voidable, but void, because it undertook to accomplish the impossible. Equity never undertakes to divide the unseen or invisible, but only that which it can see and measure so as to produce equality. Air, gas, water, and oil are not susceptible of partition in kind, independent of land, either when hidden beneath the surface or floating above it, but only when reduced to actual possession and control. Neither are the rights and privileges to acquire possession of these fugitive substances susceptible of partition in kind, but they may be sold, and the proceeds thereof divided. The land under which the oil and gas is supposed to exist may be partitioned in such manner among the co-owners of the surface as to effect a division of the gas and oil privileges, but not in the manner attempted in the present decree. Franklinite Co. v. Condit, 19 N. J. Eq. 394. * * *

Plaintiff is a joint owner of the oil and gas, but has no interest in the surface, except with his co-owners, likewise co-tenants in the surface. He has the indivisible right with them to bore wells for the extraction of oil and gas, but has no separate right to enter on the lands at any place to bore for oil or gas. So that, when the court by its anomalous partition undertook to divide the oil and gas by imaginary lines over the surface, it could not confer on plaintiff the right to enter on the divisions assigned to him, for this right he did not possess, nor was he entitled thereto; and any of the co-tenants of the surface have the legal right to prevent him from so doing. Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411. Hence the effect

of the court's decree, if permitted to be of any force, was to take away and destroy plaintiff's reserved rights to the oil and gas. Thence its nullity; for if plaintiff had no separate right to bore for oil and gas, he had the right to demand his share of the oil and gas brought to the surface by his co-owners, notwithstanding the decree. The decree, therefore, was nothing more than an absolutely void cloud, that hindered him from the enjoyment of his interest in the oil and gas produced by his co-owners in the exercise of their indivisible right to produce the same. For this he could not sue in ejectment, and his only adequate remedy was by an appeal to a court of equity, which could nullify the void decree, and at the same time restore to him his dispossessed rights. While it is true that a court of equity has jurisdiction to determine what property is partible, it has no jurisdiction to partition property which is nondivisible, and thus entirely destroy it; for in attempting to do so it exceeds its jurisdiction, and renders its decree void. It ceases to be a court of equity, and becomes a court of inequity, inequality, and injustice. It assumes a jurisdiction over property not given to it either by common statute or constitutional law, in violation of the natural and reserved rights of the individual, and its decrees are nullities, and binding on no person. "If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void." 1 Freem. Judgm. § 120c. Under no circumstances had the court the authority to grant this decree attempting to partition an indivisible right. Norfolk & W. R. Co. v. Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414. Although the court have jurisdiction of the subject-matter and the person, yet, if it grants relief which under no circumstances it has the authority to grant, its judgment is void. Fithian v. Monks, 43 Mo. 502. The decree was both physically and legally impossible. The decree in this case should be reversed, the decree of partition vacated as a nullity, and the cause remanded for further proceedings according to principles governing courts of equity.

Section 2.—Mining Partnerships.

CHILDERS ET AL. v. NEELY.

1899. SUPREME COURT OF APPEALS OF WEST VIRGINIA.

47 W. Va. 70, 34 S. E. 828.

BILL by J. M. Childers and another against S. H. Neely. Judgment for plaintiffs, and defendant appeals. Reversed.

BRANNON, J.[24]—Childers and Ramey filed a bill in equity in the circuit court of Tyler against Neely, praying that a partnership between them be dissolved, an account taken "of all its accounts, dealings, and transactions whatever," and that a manager be appointed to take charge of the property. The business was oil production. Neely admitted the joint enterprise, but denied the partnership; and he joined in request for account, and did not resist a dissolution, if a partnership. The decrees made a partial account, decreed its balance against Neely, and denied him further participation in the partnership, and he appealed.

This case raises an interesting and important subject in this mining state; that is, whether, and when, joint tenants or tenants in common, jointly operating for oil, are partners, or merely co-owners. The bill asserts a partnership, while Neely denies it; asserting that it is a case, not of partnership, but co-ownership.

In two leases of town lots for oil and gas purposes, Childers owned a one-fourth interest; Ramey, a three-eighths interest; Neely, a three-eighths interest. They were so far joint tenants. They agreed to develop the lots for oil, but made no written articles of partnership,—in fact, no oral express formation of a partnership. They simply, by an indefinite understanding, agreed to develop their common property, each giving his skill, paying his share of outlay proportionate to his ownership, and getting his share of the product proportioned to such ownership. I use the word "product," instead of "profits," because there was no contract explicit on this point to distinguish product from profit. "Partnership must be distinguished from joint management of property owned in common. Where two partners own a chattel, and make a profit by the use of it, they are not partners, without some special agreement which makes them so." T. Pars. Partn. § 76. Two heirs or other co-owners of a farm, jointly farming it for a profit, are not partners. There is a peculiar partnership, called a "mining partnership," partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. It is an important question to those engaged in the oil and other mining business whether each one is jointly and severally liable for all the doings of every or any other of the associates in the venture, as in ordinary trading partnerships. What is a mining partnership? 15 Am. & Eng. Enc. Law, p. 609, says: "When tenants in common of a mine unite and co-operate in working it, they constitute a mining partnership." Many authorities there cited thus define it. See the California case of Skillman v. Lachman, 83 Am. Dec. 96, and note discussing it fully; Lamar's Ex'r v. Hale, 79 Va. 147. Mere co-working makes them partners, without special contract. Barring. & A. Mines & M. Courts of equity take jurisdiction

[24] Parts of the opinion are omitted.

of them as if general partnerships. 2 Colly. Partn. c. 35. Of course, owners of mines, oil leases, or farms can by agreement make an ordinary partnership therein; but "where tenants in common of mines or oil leases or lands actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, though there is no express agreement between them to be partners or to share profits and loss." Duryea v. Burt, 28 Cal. 569. The presumption in such case would be that of a mining partnership, rather than an ordinary one, in absence of an express agreement forming an ordinary general partnership. Perhaps the case of Bank v. Osborne, 159 Pa. St. 10, 28 Atl. 163, and other cases in that state cited in Bryan, Petroleum & Natural Gas, 283, would justify the inference that the parties operated as tenants in common; but the current of authority elsewhere recognizes the inference of mining partnerships. That state does not recognize such a partnership. Justice Field said in Kahn v. Smelting Co., 102 U. S. 645, 26 L. Ed. 266; "Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary partnerships, exist in all mining communities. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." One leading distinction between the mining partnership and the general one is that the general one has, as a material element of its membership, the delectus personæ (choice of person), while the other has not. Those forming an ordinary partnership select the persons to form it, always from fitness, worthiness of personal confidence; but we know such is not always or often the case in oil ventures. It is because of this delectus personæ that the law gives such wide authority of one member to bind another by contracts, by notes, and otherwise. One is the chosen agent of the other. Hence, when one member dies or is bankrupt, or sells his interest to a stranger, even to an associate, the partnership is closed, one chosen member is gone, the union broken, because he may have been the chief dependence for success, and the newcomer may be an unacceptable person, who would entail failure upon the firm. In the mining partnership those occurrences make no dissolution, but the others go on; and, in case a stranger has bought the interest of a member, the stranger takes the place of him who sold his interest, and cannot be excluded. If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences. From the absence of this delectus personæ in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is

shown that he had authority; nor can a general superintendent or manager. They can only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business. Charles v. Eshleman, 5 Colo. 107; Skillman v. Lachman, 83 Am. Dec. 96, and note; McConnell v. Denver, 35 Cal. 365; Jones v. Clark, 42 Cal. 181; Manville v. Parks, 7 Colo. 128, 2 Pac. 212; Congdon v. Olds, 18 Mont. 487, 46 Pac. 261; Judge v. Braswell, 13 Bush, 67; Waldron v. Hughes, 44 W. Va. 126, 29 S. E. 505. In fact, it is a rule that a nontrading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as, e. g. a partnership to run a theater or other single enterprise only. Pease v. Cole, 53 Conn. 53, 22 Atl. 681; Deardorf's Adm'r v. Thacher, 78 Mo. 128; Smith, Merc. Law, 82; T. Pars. Partn. § 85; Pooley v. Whitmore, 27 Am. Rep. 733. A mining partnership is a nontrading partnership, and its members are limited to expenditures necessary and usual in the particular business. Bates, Partn. § 329. Members of a mining partnership, holding the major portion of property, have power to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned. Dougherty v. Creary, 89 Am. Dec. 116.

These principles settle much of this case. The demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction to settle partnership accounts. 5 Am. & Eng. Dec. Eq. 74; 17 Am. & Eng. Enc. Law, 1273. * * *

When this suit was brought, Childers and Ramey obtained in it an injunction enjoining the pipe-line companies transporting the firm's oil from paying Neely for his share of the oil to which he was entitled under his division orders, and enjoining Neely from any further participation in the partnership, and from selling his share of the oil; thus taking from him the wells and their proceeds, and leaving Ramey in sole charge of them. Neely complains that the court refused to dissolve this injunction. His counsel says there was no right to it, as the bill charged no insolvency. The bill, however, did charge that Neely had failed to contribute his part of the expense of the business, and that Ramey and Childers had made large outlays therefor, and that Neely had refused to make settlement, and was largely indebted to his associates from the transactions of the partnership. This justifies the injunction, if the oil of Neely were social assets, as partners, in advancing for expenditures for the partnership, have a lien on partnership property for advances. Skillman v. Lachman, 83 Am. Dec. 109; Duryea v. Burt, 28 Cal. 570; T. Pars. Partn. § 402, note. But this lien is only on partnership property, while distinctly such; for it is the law that if there is a separation or division of the property, or part of it, there is no lien. If two

partners consign goods for sale, and direct the consignee to carry the proceeds to the account of each, and it is done, neither partner has any lien on the share of the other in those proceeds, though it would have been otherwise if they had remained part of the common property. 2 Lindl. Partn. § 683; 1 Colly. Partn. § 108, note. Now, these partners agreed to have division orders when they began business (that is, the pipe lines to give each a certificate of his share of the oil committed to them, which was a product of the wells); and this effected a separation of that product, making each one's share his several property, and severing it from the social property, if it was such at any moment. There being no lien, there was no justification for the injunction. It perhaps disabled Neely from paying as the bill demanded of him.

There is another error in the proceeding. The bill demanded a dissolution. It showed abundant cause, and the evidence shows abundant cause, of dissolution. * * * A receiver, impartial between them, was proper, under the circumstances. "If no dissolution is sought, a receiver and manager will not be appointed; but, with a view to a dissolution or winding up, a receiver and manager will be appointed, if there are any such grounds for appointment as are proper in other cases, or if the partners cannot agree to working the mines until sold." Colly Partn. § 381.[25] Therefore we dissolve the injunction, reverse the decree, overrule the demurrer to the bill, and remand for further proceedings as herein indicated, and further according to principles governing courts of equity in such cases.[26]

[25] In Dalliba v. Riggs, 7 Ida. 779, 82 Pac. 107, it was laid down that while a court of equity can appoint a receiver to perfect and preserve mining property, it "has no authority to place its receiver in charge of such property and operate the same, carrying on a general mining business, and when it turns out to be at a loss, as is likely to be the result in such cases, charge the same up as a preferred claim and lien against the property, to the prejudice and loss of the holders of prior recorded liens on the same property" (82 Pac. at pp. 108–109). In that case the receiver appeared to have carried on the mining operations without any order of court directing him to do so and with reckless extravagance, and in addition was shown not only not to have kept accurate accounts but also to have made in the account filed "many charges against the estate where no charge whatever should have been made and none in fact existed." The court accordingly denied the receiver any allowance for his own time or services and any allowance for attorney's fees.

[26] On mining partnership, see Costigan, Mining Law, 490–493. See also on prospecting or grub-staking contracts, id., 481–483. A grub-staking contract does not make a partnership unless the agreement goes beyond the mere furnishing of supplies in consideration of an interest in the claims discovered. Costello v. Scott, 30 Nev. 43, 93 Pac. 1.

CHAPTER XII.

RIGHTS OF ACCESS ON SEVERANCE OF SURFACE FROM MINERALS AND RIGHTS OF SUBJACENT AND OF LATERAL SUPPORT.

CHARTIERS BLOCK COAL CO. v. MELLON ET AL.

1893. SUPREME COURT OF PENNSYLVANIA.
152 Pa. St. 286, 25 Atl. 597.

BILL in equity by the Chartiers Block Coal Company against W. L. Mellon and others for an injunction. The injunction was denied, and plaintiff appeals. Affirmed.

PAXSON, C. J.—This is a case of first impressions, and of very grave importance, and in view of these facts we have been asked to express our opinion of the law bearing upon it, notwithstanding it is an appeal from a decree awarding a preliminary injunction. The facts are probably as fully before us now as they will ever be. The contest arises between the owner of the surface or his lessees and the Chartiers Block Coal Company, the plaintiff below and appellant, which is the owner in fee of the coal beneath the surface. The company purchased the coal on December 22, 1881, and the deed conveying it granted not only all the coal, but also the mining rights and privileges, including the right to enter mines and carry away all the coal; the right to make openings or entries, air courses, water courses, drainage, and shafts, with right of ingress and egress for the purpose of making such openings, with right of way for taking such coal or any other coal and minerals through the entries; and also the right to enter upon the surface of the land for the purpose of taking into and placing on the same any material that it may desire and need in its coal operations; and, when making entries or shafts, the right to deposit the *debris* and slack near the openings. The grantor, in conveying the coal with these privileges, reserved to himself no right, privilege, or easement in said coal, or any part thereof, and no right of way through said coal from the surface, to obtain gas or oil, or any other substance. It is not likely, at the time the grant was made, that it occurred either to the grantor or the grantee of the coal that underneath the latter there might lie another substance of perhaps greater value than the subject of the grant itself. It now appears that the coal is underlain with the oil and gas bearing sand, which can only be reached by sinking wells

from the surface through the *strata* of coal. Shortly before the filing of this bill it began to be known that oil or gas existed in large quantities in that part of Allegheny county where the appellant's works are situated, and active operations had begun in the early summer of 1891 by oil operators, to obtain this oil and gas. About this time the surface owner made leases for oil and gas purposes, and the lessees began at once to drill. This bill was then filed by the appellant company for the purpose of obtaining an injunction against the defendants, to restrain them from further drilling wells then commenced, and from drilling any other well or wells which would pass through the coal. The bill was filed upon the allegation and belief that the defendants had no right whatever to drill the wells. The plaintiff company also claimed that it was impossible for such wells to be drilled in such a manner as to allow the removal of all the coal without exposing the mine to leakage from gas from said wells, and rendering the mine operations so hazardous to plaintiff's property and plaintiff's employes as to very greatly injure and depreciate the value of said coal property, if not wholly to destroy the value thereof.

The case was heard below upon bill, answer, and affidavits. The court, as we understand the decree, refused to grant a preliminary injunction as against any well or wells on said tract of land which at the date of the decree had been drilled by the defendants through the Pittsburgh vein of coal, and also refused to enjoin the defendants from drilling wells on said tract at any place or places where they will not pass through said Pittsburgh vein of coal, but will pass through lower *strata* of coal. The court awarded an injunction, however, as to any wells not already drilled which would pass through the Pittsburgh vein, and, in addition to the ordinary injunction bond, the decree required that the defendants should execute and deliver to the plaintiff their bond in the sum of $10,000, with two sureties to be approved by the court, conditioned that in putting down and operating any wells now in process of drilling, or which may hereafter be drilled under this decree, said defendants shall protect said coal and property of said plaintiff, and also the plaintiff's employes in and about said coal, from all damages by reason of said wells, and that they will use the best methods, devices, and appliances in the construction and operation of such wells; and that before said wells are abandoned they shall securely plug the same above each oil and gas bearing sand. Subsequently the decree was modified so as to remove the injunction from the two wells now commenced, but which have not gone down through the Pittsburgh coal vein, on defendants' giving bond as before stated.

The learned judge below justified his decision, as we learn from his opinion in another case heard before him, and involving substantially the same questions, upon the ground that the owner of the surface has a right of way by necessity through the coal to reach

his oil and gas lying beneath it. But he concedes that to make such right available it would require a large modification of the rules in relation to a right of way by necessity over the surface. "Yet," to use his own language, "my present impressions are that it can and should be sustained in a reasonable manner, having due regard for the interest and rights of both parties. But it cannot be permitted to an extent that will destroy the grant of the coal, nor even to seriously depreciate it, without ample compensation. The owner of the surface cannot bore where he pleases, nor as often as he pleases. The right of designating the reasonable location of the one right of way by necessity, which the law recognizes, has always been held to be in the owner of the land. If he refuses to designate such way, then the owner of the right of way can designate it, or can apply to the court to have it located."

This is a new question, and one that is full of difficulty. The discovery of new sources of wealth, and the springing up of new industries which were never dreamed of half a century ago, sometimes present questions to which it is difficult to apply the law, as it has heretofore existed. It is the crowning merit of the common law, however, that it is not composed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise. This may be called the "expansive property of the common law." Mining rights are peculiar, and exist from necessity, and the necessity must be recognized, and the rights of mine and land owners adjusted and protected accordingly. We have an illustration of this in Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453. The mining of coal and other minerals is constantly developing new questions. Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different *strata* underneath it, and there may be as many different owners as there are *strata*. Lillibridge v. Coal Co., 143 Pa. St. 293, 22 Atl. Rep. 1035. The difficulty is to so apply the law as to give each owner the right of enjoyment of his property or *strata* without impinging upon the right of other owners, where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower *strata* to other owners.

In the earlier days of the common law the attention of buyers and sellers and therefore the attention of the courts, was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended upward to the clouds and downward to the earth's center. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income derived from it was the result of agriculture. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. Tracts that were absolutely valueless, so far as the

surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth, because of the rich deposits of coal, or iron, or oil, or gas known to underlie them at various depths. These deposits are sometimes found, however, beneath well-cultivated farms, so that the surface has a large market value apart from the value of the deposits of coal or other minerals under it. In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title, by mining operations conducted by himself, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or *stratum,* while he retains the surface for settlement and cultivation, precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or *strata* becomes a subject of taxation, of incumbrance, levy, and sale, precisely like the surface. As against the owner of the surface, each of the several purchasers would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or well, to his underlying estate, and to occupy so much of the surface, beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and to remove the product thereof. This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary; but, subject to this limitation, it is a right growing out of the contract of sale, the position of the *stratum* sold, and the impossibility of reaching it in any other manner.

So far our way is clear of difficulty, because the several owners of the mineral deposits are exercising their right to have access to their respective estates against their vendor. Our question is over the right of the vendor to reach *strata* underlying a *stratum* which he has conveyed to another. Having sold the coal underlying the surface, is he to be forever barred from reaching his estate lying beneath the coal? Prior to the sale of the coal, his estate, as before observed, reached from the heavens to the center of the earth. With the exception of the coal, his estate is still bounded by those limits. It is impossible for him to reach his underlying estate, except by puncturing the earth's surface, and going down through the coal which he has sold. While the owner of the coal may have an estate in fee therein, it is at the same time an estate that is peculiar in its nature. Much of the confusion of thought upon this subject arises from a misapprehension of the character of this estate. We must regard it from a business, as well as a legal, standpoint. The grantee of the coal owns the coal, but nothing else, save the right of access to it, and the right to take it away. Practically considered, the grant

of the coal is the grant of a right to remove it. This right is sometimes limited in point of time; in others it is without limit. In either event, it is the grant of an estate determinable upon the removal of the coal. It is, moreover, a grant of an estate which owes a servitude of support to the surface. When the coal is all removed, the estate ends, for the plain reason that the subject of it has been carried away. The space it occupied reverts to the grantor by operation of law. It needs no reservation in the deed, because it was never granted. The grantee has the right to use and occupy it while engaged in the removal of the coal, for the reason that such use is essential to the enjoyment of the grant. It cannot be seriously contended that, after the coal is removed, the owner of the surface may not utilize the space it had occupied for his own purposes, either for shafts or wells, to reach the underlying *strata*. The most that can be claimed is that, pending the removal, his right of access to the lower *strata* is suspended. The position that the owner of the coal is also the owner of the hole from which it has been removed, and may forever prevent the surface owner from reaching underlying *strata*, has no authority in reason, nor, do I think, in law. The right may be suspended during the operation of the removal of the coal to the extent of preventing any wanton interference with the coal mining, and for every necessary interference with it the surface owner must respond in damages. The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense. No one will deny the title of the surface owner to all that lies beneath the *strata* which he has sold. It is as much a part of his estate as the surface. If he is denied the means of access to it, he is literally deprived of an estate which he has never parted with. In such case the public might be debarred the use of the hidden treasures which the great laboratory of nature has provided for man's use in the bowels of the earth. Some of them, at least, are necessary to his comfort. Coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong. Abounding, as our state does, with these mineral treasures, so essential to our common prosperity, the question we are considering becomes of a *quasi* public character. It is not to be treated as a mere contest between A. and B. over a little corner of earth. We have already seen that, when the owner of the surface parted with the underlying coal, he parted with nothing but the coal. He gave no title to any of the *strata* underlying it, and it is not to be supposed for a moment that the grantor parted with or intended to part with his right of access to it. We are of opinion that he has such right of access. The only

question is how that right shall be exercised, by what authority, and under what limitations.

While there is some analogy between such right and the common-law right of way of necessity over the surface, we quite agree with the learned judge below that it would require a large modification of the common-law rule. We do not see our way clear to apply the doctrine of a surface right of way of necessity to the facts of this case. While the right of the surface owner to reach in some way his underlying *strata* is conceded, it involves too many questions affecting the rights of property, and of injury to the underlying *strata*, to be settled by the judiciary. It is a legislative, rather than a judicial, question. It needs and should promptly receive the interposition of the legislative authority. That body is now in session, and we have no doubt its wisdom will enable it to dispose of this somewhat difficult question in such manner as to protect the rights of the surface owner, and yet do no violence to the rights of others to whom he has sold one or more of the underlying *strata*. With the right conceded, there can be no serious difficulty in the lawmaking power affording a proper remedy. That remedy should be carefully guarded. The owner of the underlying *strata* should not be permitted at his mere will and pleasure to interfere with *strata* lying above him. All this requires an amount of legal machinery that a court of equity cannot supply, however wide its jurisdiction and plastic its process. In all such cases there should be a petition to the court, and a decree regulating the mode of exercise of the right. There should also be a provision for the appointment of a jury of view to assess the damages. In this way the rights of the surface owner can be preserved without any wrong to the owner of the coal.

While we do not fully sustain the reasons given by the learned judge below, we will not interfere with this decree for another reason. The plaintiff company has not yet sustained any irreparable injury by reason of the sinking of these wells, and it may never do so. We find ourselves upon a new road, without chart or compass to guide us, and we propose to move slowly. The appellants have appealed to us as chancellors, and, even if we concede their right to be clear, it does not follow that, as chancellors, we will enforce it. The effect of doing so would be to leave the owner of the surface at the absolute mercy of the owner of the coal. It is true, he can buy the coal of the latter, but only on the terms dictated by the owner. To grant the injunction as claimed by the appellant would be to destroy the estate of the surface owner in the minerals below the coal. If this were the only case of the kind in the state, we might perhaps modify our views to some extent, but when we reflect upon the fact that many other similar cases exist, and that a vast quantity of the leased coal lands in the western part of the state are underlain with oil and gas, precisely as in the case in hand, we cannot close our eyes to the fact that vast interests may be af-

fected by our decree, and great injury done to the rights of others. It is familiar law—too familiar to need the citation of authority—that the decree of a chancellor is of grace, not of right, and that he is not bound to make a decree which will do far more mischief, and work far greater injury, than the wrong which he was asked to redress. For these reasons we will not disturb the decree of the court below. The appellant company has its remedy at law, and to that we will remit it. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

WILLIAMS, J.—I concur in the decree made in this case, and in the opinion which so ably vindicates it, but I would go further. I would lay down the broad proposition that the several layers of *strata* composing the earth's crust are, by virtue of their order and arrangement, subject to reciprocal servitudes; and, as these are imposed by the laws of nature, and are indispensable to the preservation and enjoyment of the several layers or *strata* to and from which they are due, the courts should recognize and enforce them. When the servitude is the result of natural forces affecting the conformation of the surface, the courts have taken notice of it, and enforced it for and against adjoining owners. Thus, the owner of land crossed by a stream has a right, as against the owner above him, to insist on the delivery of the stream to him within its natural channel, and he is in turn bound to receive it from such upper owner. He is under a like duty to deliver it to the owner below him, and has a like right to insist that such owner shall receive it from him. The true foundation on which the relative rights and duties of these several owners must rest is not found in the order of their respective purchases, nor in the terms of the conveyances under which they take title. It is not found in any statute regulating the flow of streams or the duties of riparian owners. It is found in the character of the surface over which the stream flows, and the operation of the laws of gravity upon the water of the stream. A purchaser of land is bound to take notice of its situation, and is conclusively presumed to have bought with full knowledge of, and in subordination to, the servitude which that situation imposes. But the relation of successive farms along the course of a stream is no more clearly due to the forces of nature than are the order and position of the rocks and minerals which comprise the earth's crust. One who buys a single *stratum* is bound to know where it is, and how it is situated with reference to the *strata* above and below it; and he must be conclusively presumed to have taken title subject to the servitudes imposed by nature upon it as the necessary consequence of its position among the rocks that underlie the surface. He knows that his *stratum* lies upon and is supported by the rocks below it, and that other rocks lie upon and are supported by his *stratum*. He knows that his estate can only be reached by passing through the *strata* that overlie it, and that the estates below him can only be reached by

passing through his. This necessity is not the result of any act of his, or of his vendor, but of the relation the several *strata* bear to each other as arranged in their order by the forces of nature. They are to each other the reciprocal obligations of access and support. The lower can only be reached through the upper; the upper can only be supported by the lower. The courts have long recognized the servitude for support, and in a multitude of cases on both sides of the Atlantic have compelled its observance and punished its neglect. They have enforced the right to support as one existing independently of, and requiring no aid from, statutes or contracts, and as resting on the order of creative work and the laws of nature. This right may be waived by the owner of the surface, (Penn Gas Coal Co. v. Versailles Fuel Gas Co., 131 Pa. St. 522, 19 Atl. Rep. 933) but, if not waived, the owner of the lower *stratum* cannot escape its obligation. But the necessity for access results from the work of nature just as truly as the necessity for support. Both must be had in nature's way, or not had at all. Take away the servitude for support, and the surface may be made unsafe for either residence or cultivation, and so become valueless. Take the servitude for access which the natural arrangement of the stratified rocks imposes upon the surface, and the mineral deposits in them are inaccessible, and therefore useless. Recognize these reciprocal servitudes, and the value of the surface is preserved, while the mineral deposits are made accessible, and made to minister to the comfort and advancement of the race. They rest on the same foundation. To change the figure, they may be said to be the obverse and the reverse of the same coin. They are due from and due to every layer of the earth's crust in succession, from the surface to the center, because of the relation these layers hold to each other in the order of their creation. We do not hesitate to enforce the servitude for support, whether subjacent or adjacent, or to regulate the extent and manner in which it shall be rendered and enjoyed. With equal propriety and with equal ease we may enforce the servitude for access, and regulate the extent and manner in which it shall be rendered and enjoyed. The power of the chancellor would extend to all incidental subjects, and enable him to impose terms as to the manner in which an owner of the lower estate should exercise his right of access, the precautions he should employ, and the compensation he should make for actual injury done. It is interesting to note how generally business men engaged in developing the mineral resources of the state have recognized this right of access, and interposed no obstacle in the way of its exercise. I have before me, as I write, the estimate of well-informed producers and dealers, thoroughly familiar with the several oil fields in the state, and identified with the business from the early developments on Oil creek, 30 years ago, to the present time. This estimate fixes the total number of oil wells drilled in Pennsylvania at about 60,000, exclusive of wells drilled in localities known to pro-

duce only gas. Three fourths of the whole number are within the limits of the carboniferous measures, and one half have penetrated workable veins of coal. During these 30 years of active operations the question of the right of access to the sand rocks in which the oil is found has never before reached this court. This cannot be accounted for except upon the theory of the general concession of the right by all parties concerned in the ownership of the coal and in the operations of mining. The magnitude of the business, and the importance of this question, will be evident when it is remembered that these wells have had an average cost of about $4,000 each before oil could be secured from them, and a total cost of $240,000,000. The actual production of oil has ranged from 4,000 barrels per day 30 years ago, to 110,000 barrels per day. It is now standing at not far from 60,000 barrels. The price has fluctuated between 50 cents per barrel and $3. A conservative estimate of the production—total production—places it about 560,000,000 of barrels, with an average value of not less than $1 per barrel in its crude state. For 20 years the northern oil field was within and immediately adjoining the judicial district in which I presided, and I never heard of an accident in a coal mine that was charged upon, or that could be traced directly or indirectly to, the wells that penetrated the coal, or to the escape of oil or gas from them into the coal or the mined-out openings from which the coal had been taken. The manner in which wells are cased and tubed renders the possibility of such escape so remote as to reduce the risk of accident to proportions that are practically insignificant. But if the risk was much greater it could be provided for by requiring additional precautions to be taken, and security to be given for the reimbursement of the owner of the intermediate estate for any loss he might sustain. As it now stands, the decree of this court recognizes the existence of a right of access existing in the nature of things, wholly independent of all statutory enactments, and yet refuses to enforce that right, or regulate its exercise. It says to the owner of the lower estate: "You have an undoubted right of access to the layer of the earth's crust in which your wealth lies, but equity will not protect or aid you in its exercise. The owner of the intermediate *stratum* may sue you, and recover damages from you, for doing what it is your right to do, and a chancellor cannot hear your complaint, or lift his hands to protect you, until the legislature has provided him with ears and hands for that purpose." I would hold that the jurisdiction is as clear as the right of access; that the parties are in a court competent to deal with the whole subject; and that the decree of the court should be affirmed for that reason, and at the costs of the appellant.

NOONAN v. PARDEE.

1901. SUPREME COURT OF PENNSYLVANIA.
200 Pa. 474, 50 Atl. 255.

ACTION by Michael Noonan against Calvin Pardee, administrator. Judgment for plaintiff. Defendant appeals. Reversed.

DEAN, J.—The plaintiff purchased a lot by deed of April 22, 1890, in the borough of Hazleton, Luzerne county, and erected upon it a dwelling house. While he occupied the house, on the 11th of January, 1892, the ground under it and in the neighborhood subsided, leaving a saucer-like depression about three feet deep in the middle, and extending over about two acres. The subsidence or cave-in was caused by the mining of coal by the defendant, or his predecessors, under the subsided land; whether immediately under plaintiff's lot or at some distance is in dispute on the evidence. It is also in dispute as to the time the mining was done which caused the immediate injury. The plaintiff's deed was from one McAllister, whose title ran back through several grantors to one Michael Dugan, the last-named grantee's deed being from the Lehigh Valley Railroad Company, and is dated July 31, 1869. At that date the company was owner of both the surface and the coal underneath. In the deed is this provision: "And it is hereby made a condition of this grant, and expressly covenanted and agreed, that the said Lehigh Valley Railroad Company, their successors and assigns, do except and reserve, and shall always possess, the exclusive privilege of mining under the lot of land herein conveyed for coal and other minerals, and for that purpose may extend such tunnels, drifts, or excavations under the same, or any part thereof, as shall be necessary or convenient for the mining and removal of such coal or other minerals, subject to the condition that the surface earth covering such coal or other minerals shall not be in any manner cut, broken, or displaced; and that every damage which may be done to the said lot, or the buildings erected thereon, by the exercise of the mining privileges herein reserved, shall be made good by the said Lehigh Valley Coal Company." The defendant's testator had, about the year 1874, become the lessee of the coal from the Lehigh Valley Railroad Company. It will be noticed this was many years before the plaintiff's conveyance of April 22, 1890. At the date of the injury, defendant was in possession of and operating the mines. We do not think the stipulation in the railroad company's deed, so far as the evidence in this case is concerned, modified the defendant's liability as an operator or miner of the coal underneath the surface. The covenant in the deed neither expressly nor impliedly relieved the covenantor, or its lessees, from the duty of leaving sufficient support for the surface. It is little more than a reservation of the coal for itself and assigns, and a

stipulation for the performance of a common-law duty on its part and that of its assigns. There was evidence that the mining which caused the injury had been done directly underneath the plaintiff's lot many years before the date of his deed, and that none was done afterwards; and there was evidence on the part of the plaintiff that considerable mining had been done underneath after their occupation. In both aspects of it, this evidence had a direct bearing on the issue as made up by the pleading. The suit was trespass against the lessee of the railroad company.

The declaration is as follows: "On the 11th of January, A. D. 1892, the said defendants, under a grant of coal under said lot, said grant being made subsequent to the deed from said company to said Dugan, removed the coal under the surface earth of said lot No. 9, and so cut, broke, and displaced the earth that the surface fell in, and the dwelling house of the plaintiff thereon became greatly damaged, whereby the surface of said lot No. 9, of the value of $1,500, was wholly destroyed, and the house thereon damaged in $3,000; wherefore plaintiff claims from defendant $4,500." The injury, and only injury, here alleged is that defendant removed the coal under the surface of lot No. 9, and to that averment only did the defendant plead. He averred and argued that no mining had been done by him after the plaintiff's purchase and occupation of lot No. 9; yet the latter was permitted to recover on evidence showing a removal of the coal antedating his deed,—a fact not averred. If the cause of the injury was bad mining before the 11th of January, 1892, or the failure before that date of defendant, while mining, to leave sufficient props and supports for the surface, while the cave-in only occurred at that date, those who mined the coal would be clearly answerable. In this case it is alleged this defendant mined the coal either before or after the plaintiff's deed. If the mining which caused the subsidence was more than six years before suit brought, and the injury occurred within six years, even though the miner or operator was still in possession, he is not answerable in damages, for there is no right of action for damages until the damage occurs.

The first question raised by the assignments of error is, what was the date of the cause of action? A cause of action is that which produces or effects the result complained of. Where there has been a horizontal division of the land, the owner of the subjacent estate, coal or other mineral, owes to the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility. What the surface owner has a right to demand is sufficient support, even, if to that end, it be necessary to leave every pound of coal untouched under his land. Berwind v. Barnes, 13 Wkly. Notes Cas. 541. Also the English case, Harris v. Ryding, 5 Mees. & W. 60, in which Baron Parke uses this language: "I do not mean to say that all the coal does not belong to the defendants, but that they

cannot get it without leaving sufficient support." We have followed rigidly this rule, as thus tersely suggested, in all our decisions on the subject, and they have been many. Of course, defendant had a right to all the coal under this lot, but he had no right to take any of it, if thereby, necessarily, the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface. So there is nothing gained by adducing evidence of good or bad mining, or by a discussion of that subject. The subjacent owner in this case at some time failed in duty to the owner of the surface of this lot. The mere fact that it caved in because the coal had been mined underneath demonstrates this failure. When the coal was removed without leaving sufficient pillars, or without supplying sufficient artificial props, was the time when the subjacent owner failed in an absolute duty he owed to his neighbor above. And from that dates the cause of action. Unless, when the coal was mined, the miner left no pillars, or too few, or of too small dimensions for such a mine, or did not replace the coal with ample artificial durable props, there was no cause of action; for, as is said by Erle, J., in Bonomi v. Backhouse, 96 E. C. L. 642: "As a general principle, it is difficult to conceive a cause of action from damage when no right has been violated and no wrong has been done." That was also a mining case. It was held that the check upon mining was for the protection of the surface, and that "the surface owner, taking that advantage, may not unreasonably be held to take it with ordinary legal incidents; among others, a liability to be barred by six years from the wrongful act. In case of mining operations which are a trespass, the statute runs from the trespass, though the party may have been ignorant of the act done. The same rule may, with equal justice, apply to a surface owner notwithstanding he may have been ignorant of the violation of his right to support." This opinion was concurred in by the other two justices, Campbell and Coleridge, but on appeal to the house of lords, the judgment was reversed; so in that case the final judgment, in effect, declared that the date of the cave-in was the date from which the statute began to run. There are other English cases to the same effect, and others directly to the contrary. So conflicting are the decisions that the law on the subject in England cannot be considered settled. Cases on each side, including Bonomi v. Backhouse, have here been cited by both appellant and appellee. We think the opinion of Erle, J., from which we have quoted, by far the most satisfactory in its reasons, and more in accord with the conditions of coal mining in this country; and, as we are not bound by the final judgment in the law of England, we prefer to follow the opinion which meets our view of the law applicable to the facts before us. This court refused to follow Bononi v. Backhouse in the late case of Lewey v. Coke Co., 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684. But this last case is clearly distinguishable from

an action for failure to afford the surface sufficient support. Lewey v. Coke Co. was where the defendant from an adjoining mine had mined and removed the plaintiff's coal underneath his land, yet did not disclose the fact, and plaintiff did not discover it until after the six years had run. We held, on the facts of that case, that the statute only began to run from the time of plaintiff's discovery, and this on the grounds that the mining of his coal was a wrong, and the concealment of the wrong a fraud. He had no means of discovery; had no right of access to the mine to make observations, and defendant no right at all under his land; he had no reason to suspect or presume that one who had no claim of right would wrongfully enter on his land, and dig his coal. But here the parties who mined this coal had a right so to do; a right reserved by the original owner. The surface owner, too, had a right of sufficient support. These mutual rights gave the surface owner access to the mine to see that his right was being maintained by the performance of the duty owing to him by the coal operator. And the courts will enforce this right of access if the mine operator denies it. This has been decided in a number of cases. In this case the right of action arose when the mine operator failed to furnish sufficient support. That may have been more than six years before suit brought, or it may not. It may have been partly due to mining before and partly to mining afterwards; in which latter case the action would not be bared. If wholly due to the removal of coal six years before suit brought, and failure then to leave sufficient support, the action would be barred. The date of the cave-in and partial destruction of the house is not the date of the cause of action that was only the consequence of a previous cause, whether one month or twenty years before. It is argued that in some cases the surface owner could not know by the most careful observation whether the mine owner had neglected his duty within six years. We answer, that is only one of the incidents attending the purchase of land over coal mines. It is not improbable that this risk enters largely into the commercial value of all like surface land in that region. But, however this may be, we hold that the miner is not forever answerable for even his own default. Further, in no case is he answerable for the default of his predecessor in possession. Neither equity nor law demands that any greater burden should be placed upon him than that indicated. Any heavier one would encourage the purchase of surface over coal mines for speculation in future lawsuits. We cannot concur in the argument of appellant's counsel that plaintiffs could have had no cause of action antedating their deed. By their conveyance, there passed to them all the rights of their grantor. If the cause of the injury was within six years, although at the date of the deed the damage was not susceptible of computation, yet afterwards became so by the subsidence of the surface, their right to sue was then fixed; a right which, from the nature of the case, could not have had more than a

doubtful existence before the actual damage occurred. We do not think Road Co. v. Brosi, 22 Pa. 32, cited to sustain the argument that the right to sue does not fall to the owner who is in possession when the result demonstrates the cause of action arose before the date of his deed, is in point. Justice Lewis, in that case, says: "It is certainly true that the purchaser of an estate cannot claim damages for an injury done to it before his purchase. Such claim is a chose in action, which remains in the hands of the vendor. The vendee is presumed to pay less for his estate on account of the injury, and has, therefore, no claim to recover damages for it." But he is speaking there of the damages arising from the exercise of eminent domain by turnpike and railroad companies. In all such cases the injury is palpable. When the corporation enters upon the land, and makes its survey, it then appropriates. The extent of its excavations and embankments, as well as the quantity of land to be occupied, are as well known then as months afterwards, when the work is done. There is no reason why the grantee of the land, in the interval between the appropriation and the completion of the work, should be compensated in damages, when he has probably gained a reduction in price, because of the damage, equal to the amount of damage. But none of these reasons appear in this class of cases. When the right to sufficient support has been violated, the cause of action, it is true, arises, but the owner in possession when the consequences follow is the one who suffers. There may, in the interval, have been several owners, none of whom sustained damage except the last. He alone has the right to sue, because to him only has passed the right to enforce by suit the collection of a damage occurring during his possession. Until they actually occur, no one can tell when they will occur, or that they ever will. Each grantee has the right to presume that the subjacent owner has performed his legal duty; and the price, while probably somewhat depreciated by the possible risk, is not fixed on a presumption that his land will subside because of any special failure in duty on the part of him who has taken out the coal. There is some evidence tending to show that the cave-in was because of work within six years by defendant in the Mammoth seam, the first stratum of coal below the surface; also evidence tending to show very recent mining in the Wharton seam, the next one underneath the Mammoth; and that from one or the other cause, or from both combined, the subsidence was caused. On the whole case we deduce these propositions:

1. If the failure to furnish sufficient support to the surface was from mining, either by defendant or his predecessors, more than six years before suit, the action is barred by the statute of limitations.

2. The right to sue passes to the surface owner who is in possession when the subsidence occurs, without regard to the date of his conveyance. This right is barred by the statute of limitations if the

cause of the subsidence arose more than six years before suit brought.

3. Even if the main body of the coal under plaintiff's land has been mined out more than six years before suit brought, yet, if defendant has done additional mining by removal of coal left in previous work, or by robbing of pillars within six years before suit, and without such additional mining the surface would not have subsided during plaintiff's occupancy, yet, if such additional work or mining hastened the result, the defendant is answerable in damages therefor.

4. If defendant, by mining within six years another underlying seam (the Wharton), whereby the pillars and support left in the seam above (the Mammoth), which otherwise would have been sufficient support to the surface, have been rendered insufficient, and the cave-in occurred, defendant is answerable to plaintiff in damages.

5. If plaintiff be entitled to recover, his measure of damages is the actual loss he has sustained to his land, including the building thereon, by reason of the cave-in. The difference in the market value before and after the injury in this class of cases is not the true rule. In this case, under the evidence, perhaps it worked no injustice; but in many cases it would do so.

In a case of this character, it is of the utmost importance that the averments should be more specific as to the time the coal was mined under the lot, and as to who mined it. While, probably, we would not reverse for this paucity in the statement, nevertheless it would greatly aid in a correct review of the case if all the grounds of action were clearly and more specifically stated. But the learned judge of the court below went much further than instruction on the matter so meagerly averred, and which was the only issue in the case. Evidence was offered and received tending to show that defendant was mining coal at a distance from the lot in question in other parts of the Hazleton mine. From this evidence plaintiff argued that, even if their property had not been injured from lack of surface support in the mine underneath it, the subsidence was caused at the point under the lot by removing lateral support at other mines some distance from the lot in question. There was some evidence given to sustain this view, and the court charged as follows: "It would appear generally from the testimony that the injury complained of here did not come from the immediate mining and its consequences. Did it come from any other source? Mr. McNaie has testified (and he is a mining engineer, and has been in charge of these mines, and knows all about the inside operation of them) that there was no immediate mining under this property, to the best of his judgment, since 1858. If you should find that this injury did not come from immediate mining under the property, did it come from the general mining carried on by these defendants in the Hazleton mines, which were generally a part and parcel of these mines? If it did, and you should so find, then these defendants,

under the law, would be liable in damages for the amount of the injury which you find the plaintiffs sustained." The defendant assigns this instruction for error. When we consider that there is not an intimation in the statement that any such cause for the injury ever had an existence, it is somewhat difficult to conceive how it could have been adopted as one of the grounds of recovery. Damage for failure to furnish vertical support to the surface in mining underneath is a well-known cause of injury to the surface owner; but that an adjacent owner has, by removing lateral support, caused a vertical subsidence of the surface, is an altogether different averment of the ground of complaint. He may be the same or some other than the operator of the mine underneath. His duty is not in all respects the same. The rule for the computation of damages is not the same. The authorities are in substantial accord on this question, though not giving the same reasons. Richards v. Jenkins, 18 Law T. (N. S.) 437, and 17 Wkly. Rep. 30; Corporation of Birmingham v. Allen, 6 Ch. Div. 284; Dalton v. Angus, 6 App. Cas. 791; McGettigan v. Potts, 149 Pa. 158, 24 Atl. 198. In the last cited case it is decided that: "The rule that the owner is entitled to lateral support for his ground extends only to support for his ground in its natural state, and does not include such support for the protection of buildings or other structures placed upon it. Where, by reason of an excavation, without negligence, made by defendant on his own land, the land of the plaintiff sinks or falls away, the measure of damages is not the diminution in value of the lot of the plaintiff by reason of the act of the defendant, but the amount of injury actually done to the plaintiff's land. The measure of the damages where land is taken by right of eminent domain, which is the difference between the value of the whole of the plaintiff's land before the taking and its value immediately afterwards, has no application in such case." We do not decide that plaintiff might not have originally embraced in the same statement this cause of action, for we are of opinion he might have done so. But he did not. He could not recover on it when he alleged but the one cause, and that a different one. It was plainly error to admit, under this statement, the evidence tending to show a destruction of lateral support. The defendant had not been called into court to answer such complaint, and ought not to have had a possible verdict on that ground against him. It is now too late, under the authorities, for plaintiff to introduce this new cause of action under an amendment, for the statute of limitations bars it. See a full discussion of this subject by Sharswood, J., in Appeal of Wilhelm, 79 Pa. 134.

Appellant's third assignment of error is sustained; the others are not. We have noticed them to the extent of pointing out the course the trial should take upon a new venire, so that, if possible, we may be saved from a second review.

The judgment is reversed, and a venire facias de novo awarded.

MATULYS v. PHILADELPHIA & READING COAL & IRON CO.

1902. Supreme Court of Pennsylvania.
201 Pa. 70, 50 Atl. 823.

Action by Susan Matulys against the Philadelphia & Reading Coal & Iron Company for depriving land of lateral support. Judgment for plaintiff, and defendant appeals. Modified.

Brown, J.—In the two deeds from the appellant to the appellee, for the lots to which the alleged injury had been done, the following reservations and conditions occur: "Excepting and reserving to the said party of the first part, their lessees, tenants, or their successors and assigns, all the fossil or mineral coal, iron, and other ores that may be found under the surface of the earth within the boundaries of the above mentioned and described lot or piece of ground, with the entire right to mine, dig, and carry away the same, and to pass into and through said land in all directions, and to excavate and use the same below the surface for all purposes necessary or convenient in mining coal, ores, or minerals from said land, and from any other land, as fully and freely as if this grant had not been made, without making any compensation therefor to the said party of the second part, her heirs and assigns: provided, always, that neither the said party of the first part, or their successors or assigns, nor any other parties interested in the legal or equitable titles to the premises, shall be in any way responsible for the acts or doings of their lessees, or any of them, in working, mining, or digging the said coal, iron, or other minerals, nor for any loss or damage which such acts or doings may occasion to the said party of the second part, or any other person or persons, owners or occupiers of the premises: excepting and reserving, also, all running springs and streams of water on the surface of the ground which may at any time hereafter be diverted by the said party of the first part, their successors or assigns, if it should be deemed expedient for their use, or for the purpose of laying out and making any streets or alleys; and also the rights of laying water and gas pipes through or under the surface of the said streets or alleys, doing as little injury as possible; and also the right of making and using drifts and tunnels through and under the said lot or piece of ground in all directions, for mining purposes, on the same or other land." The injuries of which the appellee complains have not resulted from the mining of coal under the lots conveyed by these deeds, but from mining operations at least 100 feet distant, beneath surface owned by the appellant. The subsidence of that surface caused the surface of appellee's lots to crack or open, and, however earnestly learned counsel for the appellant may ask us to consider the foregoing reservations in determining whether there is any

liability to the appellee, it is manifest that the questions raised on this appeal must be considered and disposed of without regard to them. Nothing that was done beneath the lots conveyed, to which alone the exceptions and reservations in plainest words apply, injured appellee's property. No use by the appellant of the land beneath appellee's surface, in mining coal there, or in mining it "from any other land," is complained of. It was the subsidence of the surface of the adjoining property, owned by the appellant, that caused the injury for which compensation is sought, and it is clear, without further comment, that any liability of the defendant is that of an adjoining owner failing in the discharge of an absolute duty not to interfere with the lateral support of the land of appellee, and causing injury to the buildings of the latter by carelessness and negligence in mining operations on its own land. The question involved is not whether there is any liability by the appellant to the appellee, in view of the reservations in the deeds of the former to the latter, but is simply whether the Philadelphia & Reading Coal & Iron Company, in operating its own mines, is liable to an adjoining surface owner for injuries resulting from its withdrawal of lateral support, and must be determined as if the reservations had not been incorporated in the deeds.

From the testimony submitted by the plaintiff, it appears that certain supports of the surface of the land that was being mined by the defendant more than 100 feet south of plaintiff's land gave way, and a subsidence of defendant's surface followed. The surface was of rock, of some length, and, in settling, worked like a lever, the one end, or power, being on the land of defendant, and the other, or weight, on that of plaintiff. As the end on the south subsided, the other end on the north, on plaintiff's land, cracked or broke, leaving a crevice, and causing injury to the lots and buildings on them. No testimony was offered by the defendant, and, in its history of the case, it frankly admits: "The injury was not caused by mining under the lots conveyed, but by mining operations several hundred feet distant, and the subsidence of the surface at that point, causing the surface of the lots to open at different points, which the plaintiff claims injured her buildings." The case is, therefore, one of injury resulting to a landowner for the withdrawal of lateral support by an adjoining owner in its mining operations on its own land. The plaintiff was entitled to the natural lateral support of her ground, and, if the same was withdrawn by her neighbor in mining operations on its own land, for any injury to her lots resulting from the withdrawal of such support compensation must be made. The right to such lateral support is an absolute one, and the adjoining owner who withdraws it, whether negligent or not, in excavating or mining his land, is liable for injuries resulting to his neighbor's ground. McGettigan v. Potts, 149 Pa. 155, 24 Atl. 198; McGuire v. Grant, 25 N. J. Law, 365, 67 Am. Dec. 49. "But in the case of land which

is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor, and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence." Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

Under plaintiff's proof—so clear that the defendant does not attempt to controvert it—that the injury to her lots resulted from defendant's withdrawal of their lateral support in its mining operations on its own property, the learned trial judge correctly directed the jury to return a finding in her favor for the amount of damage done to the lots. By agreement of parties, this damage was fixed at $2,000, and for that sum plaintiff is entitled to judgment on the verdict. We cannot, however, approve the court's direction that a finding should be returned for $500 in favor of the plaintiff, the sum agreed upon as the amount of damage done to her buildings. The lateral support of land, to which the owner thereof has an absolute right, and for the deprivation of which by his neighbor he can maintain an action without proof of negligence, extends only to the land itself in its natural condition, and does not include support for the protection of buildings or improvements upon it. This is well settled in England and with us. McGettigan v. Potts, McGuire v. Grant, and Gilmore v. Driscoll, supra. Attention can properly be called to the numerous authorities cited in the last case. As this absolute right to lateral support is limited to the land itself in its natural condition, there can be no recovery for injuries to buildings or improvements resulting from the withdrawal of such support, in the absence of proof of negligence or carelessness in excavating or mining on the adjoining land. This is equally well settled, and the rule is nowhere more distinctly announced than in Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771, where the court, after referring to the absolute right of an adjoining owner of land to lateral support for it in its natural condition, said: "It is a necessary consequence from this principle that, for any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence,

has contributed to produce it." Is there proof of any negligence or want of care on the part of appellant which resulted in the injuries to appellee's buildings? Nothing, as we have already seen, was done beneath plaintiff's surface that caused any of the injuries complained of. No support by those mining beneath it was withheld from the upper owner, entitled to it, resulting in injuries for which there would be an unquestioned liability, and Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385, upon which appellee seems to rely, is not at all in point. If the appellant was negligent or careless, it was so only as to its own surface beneath which it was mining; but it was responsible to no one for its negligence or want of care there, unless likely to result in injury to another or his property, to whom or to which the duty of care was owed. So far as the buildings of the appellee are concerned—and, for that matter, her land itself—nothing can be found in the testimony showing negligence or carelessness by the appellant. Nothing that it did on its own land in its mining operations indicates any negligence or want of care towards its neighbor, and it could not reasonably have anticipated that, even if it failed to properly support its own surface, the peculiar injury complained of would result. Negligence or want of due care in withdrawing lateral support in excavating or mining on adjoining land, for which there is liability for injury to a neighbor's buildings, means positive negligence or manifest want of due care in the excavations or mining so far as they affect, or are likely to affect, adjoining improvements. There was not only no proof of such negligence here, but the appellant can fairly say that, even if it did not properly support its own surface, it ought not to be charged against it that it should reasonably have anticipated what happened to appellee's surface, and the improvements on the same, by reason of its failure to support its own surface.

The judgment that the appellant pay $500 for injuries to appellee's buildings is reversed, and is now for $2,000, for the injury to the surface of the lots, with interest from April 17, 1900, the date of the verdict.

PIEDMONT & GEORGE'S CREEK COAL CO. v. KEARNEY.

1911. Court of Appeals of Maryland. 14 Md. 496, 79 Atl. 1013.

Action by Charles D. Kearney against the Piedmont & George's Creek Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyd, C. J.[1]—The appellee sued the appellant for damages alleged

[1] The statement of the prayers for instructions to the jury, (reported just preceding the opinion,) and parts of the opinion are omitted.

to have been sustained by him by reason of the appellant removing the coal which supported the surface owned by him in a tract of land containing fourteen acres. The property was conveyed to the plaintiff in 1897, "except, however, all coal and other minerals on or underlying said above granted property to the same extent and in like manner as excepted in the said deed from Maria Reese, et al. to Daniel Ritchey and Stewart Arnold above described." In the deed referred to is this reservation: "The parties of the first part reserve to themselves, their heirs and assigns, all coal and other minerals that have been or may hereafter be found on or in the said lands, together with the right to mine and remove the said coal or minerals at such place or places as may appear to them, the said first parties, their heirs or assigns, most suitable and convenient by tramroad, plane and dump houses or otherwise," etc. * * *

Before passing on the exceptions separately, it will be well to ascertain what the law is as between the owner of the surface and the owner of the minerals, when those estates have been severed by such provisions or reservations as those now before us. This is the first time this court has been called upon to pass on the doctrine of subjacent support, where the surface and subjacent estates are owned by different persons.

[1] The general rule of law is that when the estate in minerals "in place," as they are sometimes spoken of in their natural bed, is severed from the estate in the surface, the owner of the latter has an undoubted right of subjacent support for the surface, and the owner of the estate in the minerals is entitled to remove only so much of them as he can take without injury to the surface, unless otherwise authorized by contract or statute. There have been some discussions in the books as to the reasons upon which the rule was founded, but we have seen no case in which it has been unqualifiedly denied. Even in Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115, which has gone as far in sustaining the right of the owner of the minerals to remove all of them as any decision we have found, the general doctrine is recognized. Without referring to the English cases upon which the original decisions in this country were based, the general rule announced above is sustained by many of the courts of this country; the cases in Pennsylvania, where so much mining has been done, being especially numerous. Amongst others are Williams v. Gibson, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368; Collinsville Granite Co. v. Phillips, 123 Ga. 830, 51 S. E. 666; Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242; Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109; Mickle v. Douglas, 75 Iowa 78, 39 N. W. 198; Erickson v. Michigan Land & Iron Co., 50 Mich. 604, 16 N. W. 161; Chicago, etc., R. Co. v. Brandau, 81 Mo. App. 1; Marvin v. Brewster Iron Min. Co., 55

N. Y. 538, 14 Am. Rep. 322; Burgner v. Humphrey, 41 Ohio St. 340; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385; Coleman v. Chadwick, 80 Pa. 81, 21 Am. Rep. 93; Carlin v. Chappel, 101 Pa. 350, 47 Am. Rep. 722; Williams v. Hay, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719; Pringle v. Vesta Coal Co., 172 Pa. 438, 33 Atl. 690; Robertson v. Youghiogheny River Coal Co., 172 Pa. 566, 33 Atl. 706; Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; Youghiogheny River Coal Co. v. Allegheny National Bank, 211 Pa. 319, 60 Atl. 924, 69 L. R. A. 637; Miles v. Penn. Coal Co., 217 Pa. 449, 66 Atl. 764 (annotated in 10 Am. & Eng. Ann. Cas. 874). A number of the English cases are cited in the notes to Trinidad Asphalt Co. v. Ambard [1899] A. C. 594, to be found in 6 Am. & Eng. Dec. in Eq. 643, and in some of the cases referred to above, and we will not make further reference to them.

[2] Although the rule has been so generally adopted, the parties can modify it or avoid its application by inserting provisions in the grants or leases which, expressly or by necessary intendment, relieve the owners of the minerals of the duty to furnish subjacent support, and in many of the cases which have been before the courts the question has been whether that was done by the particular provisions, and, if so, to what extent. We have quoted [cited] above those which must govern in this case. There are many decisions in which provisions very similar to these have been held not to be sufficient to relieve the owners of the minerals of their duty to support the surface. In Mickle v. Douglas, supra, there was a lease with the right to mine, "all the coal"; in Burgner v. Humphrey, supra, there was a grant of "all the mineral, coal, iron ore, limestone, and all other minerals," with the right to enter upon the land and search and explore thereon for said minerals, coal, etc., "and when found to exist on said land to dig, mine, and remove the same therefrom"; in Horner v. Watson, 79 Pa. 242, 21 Am. Rep. 55, the grant was all the coal, with the right to enter on the lands for the purpose of "mining, excavating, and removing said coal"; in Carlin v. Chappel, supra, the deed of the surface reserved "all the coal," with the right of ingress, egress and regress, "for digging, mining, excavating, and conveying away said coal"; in Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 Atl. 545, the grant was for "all the merchantable coal in and underlying all that tract of land" for which the right of surface support was claimed, excepting five acres under the buildings and spring, the usual mining rights, were granted, "with the right to mine and carry away all the said coal, and with all the mining rights and privileges necessary or convenient to such mining and removal of the same." See, also, Dignan v. Altoona Coal & Coke Co., 222 Pa. 390, 71 Atl. 845, 128 Am. St. Rep. 812, one of the latest on the subject. In those cases it was held that the right of subjacent support was not released in

express terms or by necessary implication by the words used. Many others in accord with that position might be cited, but we will only refer to the note in Griffin v. Fairmont Coal Co., 2 L. R. A. (N. S.) 1115, and the note to Miles v. Penna. Coal Co., 10 Am. & Eng. Ann. Cas. 874, where many of them are collected. The case of Miles v. Penna. Coal Co. is an illustration of how such right can be released,[2] while, on the other hand, that of Youghiogheny River Coal Co. v. Hopkins, 198 Pa. 343, 48 Atl. 19, shows how careful that court is to sustain the right, unless it is released by express words or necessary implication. The case of Griffin v. Fairmont Coal Co., supra, is the only one we have found where language similar to that in the reservation in the deed now before us was held to be a release.[3] When the doctrine or right of subjacent support is recognized, as it is with practical unanimity by the authorities, it seems to us to be far better to require those who desire to enter into stipulations by which the one party to the transaction is to part with the right which the law gives him, and the other is to be relieved of a duty which the law imposed upon him, to use language that will necessarily import or clearly express such intention. It should be either by express words or necessary implication, and in our judgment the language used in this reservation was not sufficient to relieve the appellant of its duty to support the surface. It is also held by the authorities that a failure to leave sufficient support for the surface is negligence and may be so declared on. Yandes v. Wright, supra; Jones v. Wagner, supra; Carlin v. Chappel, supra.

[3] Having thus ascertained the rights and duties of the respective parties to this suit by reason of the ownership of the surface by the plaintiff and the coal by the defendant, we will now consider the particular grounds of complaint urged against the rulings of the court by the appellant. * * *

[2] In Miles v. Pennsylvania Coal Co., 217 Pa. 449, 66 Atl. 764, there was a demise of "all the merchantable coal lying and being in the veins in, under and upon" the land described "together with the right to mine and remove said coal in said veins until all the merchantable coal has been mined and removed from said veins on said hereby leased premises" and from the construction of that and of other language in the lease giving the lessee unlimited surface rights the court reached the conclusion that the lessee was intended to have and did have the right to remove all the coal, including certain pillars of coal which supported the surface, "without liability for injury done thereby to the surface."

[3] In Griffin v. Fairmount Coal Co., the grantee of coal with the right to remove "all" of it was held to have the right to remove the coal without any obligation to leave any to support the surface and therefore without liability for the subsidence of the surface necessarily caused by the removal of the coal. But, "It would seem as if the grantee of coal or of precious metal minerals should not have the right to deprive the surface of support, unless the right to let down the surface is granted in express terms or by unavoidable implication, which does not exist where 'all the coal' or 'all the mineral' is granted; and that is the majority view."—Costigan, Mining Law, 506.

The defendant by its second prayer asked the court to instruct the jury "that they cannot under the pleadings and evidence in this cause allow anything for the reduction of moisture in the surface even though they should believe that the reduction of the moisture in the land was the direct result of the mining of the coal under the land of the plaintiff." It will be observed that that prayer asked the court to instruct the jury that they could not "allow anything for the reduction of moisture in the surface." The testimony shows that the depth of the cover was 350 or 400 feet, and it was admitted at the opening of the case that "all the coal to a depth of six feet under the plaintiff's property was removed by the defendant company after the year 1906, and that no stumps or pillars were left, and that this was done before the injuries to the surface." The rule is well established that the owner of the coal is not liable to the owner of the surface for injuries resulting from the diversion of what are spoken of as hidden streams, caused merely by the removal of the coal. In Coleman v. Chadwick, 80 Pa. 87, 21 Am. Rep. 93, relied on by the appellant, the court said: "So far as we can judge from the record, the loss of the plaintiff's springs was occasioned by the ordinary operation of mining, and would have occurred though no part of the surface had been broken. Mining must interfere, more or less, with those subterranean streams and percolations of water which appear upon the surface as springs. To say that the owner of the substrata shall be accountable in damage for their disturbance is to say that he shall have no use whatever of his minerals, for, without interfering to some extent with such waters, mining is impossible." That seems to us to be a very sensible and necessary rule to adopt.

But the principle referred to in Coleman v. Chadwick does not reach the question here involved, for, conceding to its full extent that no damage can be recovered for the diversion of the water, if the coal is worked in the ordinary and proper way, if it is so worked as to take away the support of the surface, then it is not worked in a proper way. This prayer proposed to disallow anything for the reduction of moisture in the surface, while it must be clear that if the loss of moisture is the result of the breaks in the surface, caused by want of the support which the defendant owed the plaintiff's surface, then the loss of moisture is like any other damage which is the result of that wrong done the plaintiff. The prayer was too broad.

The cases in Pennsylvania show the distinction we have pointed out. In Kistler v. Thompson, 158 Pa. 139, 27 Atl. 874, the court said: "Nothing could be more clear or more correct than the charge of the learned court below to the jury on all the legal aspects of the case." Judge McIlvaine in the lower court, in speaking of a spring which the plaintiff claimed was valuable to her property, said: "In 1889 this spring disappeared, and she alleges that the spring disappeared by reason of the subsidence of the surface, and the crack-

ing of it, on account of the support being withdrawn by those that mined the coal, they having failed to leave sufficient coal to support the surface." He then went on to explain the duties and liabilities of the owner of the coal when the title to the surface is in another party, and he said he had the right to remove the coal, "and if, in so doing, he should interfere with the hidden streams of water that may be running through the earth, and thus drain the spring of another, he would not be liable for damages, if the spring failed simply because, in the ordinary operation of the mine, some subterranean stream was tapped, and by this means the water, in place of flowing to the opening in the ground where the spring was, flowed to some other place." He then went on to say, however, that, notwithstanding his right to remove the coal, he is required to leave enough to support the surface, or, if he takes all of it out, he must substitute sufficient supports to keep the surface in place, and he added: "Now, if he fails to leave sufficient support, * * * and by reason of this failure to leave sufficient support the ground sinks, subsides and cracks, and that sinking and cracking divert a stream of water, then he would be liable, because that would be the direct result of his wrongfully withdrawing the support that is necessary and sufficient to sustain the surface." In Rabe v. Shoenberger Coal Co., 213 Pa. 252, 62 Atl. 854, 3 L. R. A. (N. S.) 782, annotated in 5 Am. & Eng. Ann. Cas. 216, the plaintiff had a dairy farm which was usually well supplied with water. It had 12 springs on it, with water in every field. The plaintiff claimed that five of the springs were destroyed by the cracks in the land. The question was, "How much was the farm depreciated in value by the loss of the springs?" The controversy there was as to the measure of damages, but the court expressed no doubt about the right to recover for the loss of the springs destroyed by the cracks in the land. In Weaver v. Berwind-White Coal Co., supra, the right of the plaintiff to recover for loss of springs, which resulted from the removal of the surface supports, was fully recognized.

So, without further discussing that question, we think there was no error in the rulings in the first and second bills of exception, or in rejecting the defendant's second prayer. * * *

[6] It must be admitted that the rulings on the questions presented by the third and fourth exceptions and the plaintiff's second prayer were not so free from doubt as the others, but, when they are carefully considered, they do not seem to be subject to the objections that have been urged against them. * * *

There was therefore ample evidence tending to show that the farm was seriously and permanently injured, and that the house was likewise not only seriously injured, but was, up to the time of the trial, continuing to crack and get worse. Under those circumstances, it would seem strange if the law furnished no relief

but repairing the house. There was apparently no attempt on the part of the defendant to show that it could be repaired. * * *

As will be seen by one of the cases cited above (Weaver's Case), and there are many others to the same effect, "if the injury is reparable the cost of repairing may be recovered, and if the cost of repairing is greater than the diminution in the market value, the latter is the true measure of damages." So in a case where the cost of repairing exceeds or approaches (as indicated by the evidence) the diminution in the market value, it must be relevant to prove that value, for otherwise there would be no way of determining whether the cost of repairing was greater than the diminution in value; and hence for that reason it was not error to allow it to be proved—indeed, justice to the defendant might require it, under the above rule, if the cost of repairing exceeded it. So, under all the circumstances, we are of the opinion that there was no reversible error in admitting the testimony embraced in the third and fourth bills of exception, and that the plaintiff's second prayer was sufficiently guarded to prevent doing the defendant injustice. As the testimony shows that the injury to the land is not only of a permanent character, but depreciates the value considerably more than one-half, which of itself must affect the value of the house, and as it also shows, with no evidence to the contrary, that the house was permanently injured, and was still continuing to develop such conditions as to make repairs of little, if of any, use, we are of the opinion that the difference between the market value of the premises (taken as a whole) before the injury and their present market value in so far as the jury found it "has been reduced by injuries to the surface and to the improvements thereon" was the correct measure of damages. It follows that the judgment will be affirmed.

Judgment affirmed, the appellant to pay the costs, above and below.

APPENDIX

TITLE XXXII, CHAPTER 6, REVISED STATUTES.

Mineral Lands Reserved.

SEC. 2318. In all cases lands valuable for mineral shall be reserved from sale, except as otherwise expressly directed by law.

Mineral Lands Open to Purchase by Citizens.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Length of Mining Claims Upon Veins or Lodes.

SEC. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one of more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

Proof of Citizenship.

SEC. 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

Locators' Rights of Possession and Enjoyment.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Owners of Tunnels, Rights of.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Regulations Made by Miners.

SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, pro-

vided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures.

Patents for Mineral lands, how obtained.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this appplication, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Adverse Claim, Proceedings on.

SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of compentent jurisdiction, or the adverse claim waived.

It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

Description of Mining Vein or Lode Claims—Monuments.

SEC. 2327. The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

Pending Applications; Existing Rights.

SEC. 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

Conformity of Placer Claims to Surveys, Limit of.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and

patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Subdivisions of Ten-Acre Tracts; Maximum of Placer Locations.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

Conformity of Placer Claims to Surveys, Limitation of Claims.

SEC. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-lands surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisons, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of argricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

What Evidence of Possession, &c., to Establish a Right to a Patent.

SEC. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Proceedings for Patent for Placer Claim, &c.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim

has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Surveyor General to Appoint Surveyors of Mining Claims, &c.

SEC. 2334. The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and moneys paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land Office.

Verification of Affidavits, &c.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Where Veins Intersect, &c.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Patents for Nonmineral Lands, &c.

SEC. 2337. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same

must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

What Conditions of Sale May Be Made by Local Legislature.

SEC. 2338. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Vested Rights to Use of Water for Mining, &c.; Right of Way for Canals.

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Patents, Preemptions and Homesteads Subject to Vested and Accrued Water Rights.

SEC. 2340. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Mineral Lands in Which No Valuable Mines Are Discovered Open to Homesteads.

SEC. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of preemption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads."

Mineral Lands, How Set Apart as Agricultural Lands.

SEC. 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to preemption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

Additional Land Districts and Officers, Power of the President to Provide.

SEC. 2343. The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

Provisions of This Chapter Not to Affect Certain Rights.

SEC. 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a drainage and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

Mineral Lands in Certain States Excepted.

SEC. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona fide entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the sme minimum price, and under the same rights of preemption as other public lands.

Grant of Lands to States or Corporations Not to Include Mineral Lands.

SEC. 2346. No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

SOME OF THE ACTS OF CONGRESS PASSED SUBSEQUENT TO THE REVISED STATUTES.

An act to amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five. [Approved June 6, 1874.]

An act to amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on

the surface of said lode or lodes in order to hold the same as required by said act. [Approved February 11, 1875.]

An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months. [Approved June 3, 1878.]

An act to amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States concerning mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided,* That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided,* That this section shall apply to all applications now pending for patents to mineral lands."

SEC. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided,* That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two." [Approved January 22, 1880.]

An act to amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title. [Approved March 3, 1881.]

An act to amend section twenty-three hundred and twenty-six of the Revised Statutes in regard to mineral lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory. [Approved April 26, 1882].

An act to repeal the timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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SEC. 16. That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be required by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof, and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs, and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending

June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz.: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not include lands entered or sought to be entered under mineral land laws. [Approved March 3, 1891.]

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An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: *Provided,* That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act. [Approved August 4, 1892.]

An act to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-three: *Provided,* That the claimant or claimants of any mining location, in order to secure the benefits of this act shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however,* That the provisions of this act shall not apply to the State of South Dakota.

This act shall take effect from and after its passage. [Approved November 3, 1893.]

An act to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been reguarly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-four: *Provided,* That the claimant or claimants of any mining location, in order to secure the benefits of

this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however,* That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage. [Approved July 18, 1894.]

An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof. [Approved February 11, 1897.]

An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

* * * * * * *

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * * * * *

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locat-

ing, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

* * * * * * *

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained. [Approved June 4, 1897.]

An act making further provisions for a civil government for Alaska, and for other purposes.

* * * * * * *

SEC. 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the Attorney-General, record separately, in large and well-bound separate books, in fair hand:

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been acknowledged or proved, mortgages upon personal property;

* * * * * * *

Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements:

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others: *Provided*, Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the courts having supervision over the recording division in which such property or subject-matter is situated.

* * * * * * *

* * * *Provided*, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: *Provided further*, All records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act.

SEC. 26. The laws of the United States relating to mining claims, mineral

locations, and rights incident thereto are hereby extended to the district of Alaska: *Provided,* That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further,* That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permits shall be granted by the Secretary of War authorizing any person or persons, corporation, or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation; and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," shall not apply to mineral lands or town sites. [Approved June 6, 1900.]

An act extending the mining laws to saline lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided,* That the same person shall not locate or enter more than one claim hereunder. [Approved January 31, 1901.]

An act defining what shall constitute and providing for assessments on oil mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: *Provided,* That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims. [Approved February 12, 1903.]

An act to amend the laws governing labor or improvements upon mining claims in Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or develop-

ment of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Such affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

SEC. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded. [Approved March 2, 1907.]

An act for relief of applicants for mineral surveys.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of the moneys heretofore or hereafter covered into the Treasury from deposits made by individuals to cover cost of work performed and to be performed in the offices of the United States surveyors-general in connection with the survey of mineral lands, any excess in the amount deposited over and above the actual cost of the work performed, including all expenses incident thereto for which the deposits were severally made or the whole of any unused deposit; and such sums, as the several cases may be, shall be deemed to be annually and permanently appropriated for that purpose. Such repayments shall be made to the person or persons who made the several deposits, or to his or their legal representatives, after the completion or abandonment of the work for which the deposits were made, and upon an account certified by the surveyor-general of the district in which the mineral land surveyed, or sought to be surveyed is situated and approved by the Commissioner of the General Land Office. [Approved February 24, 1909.]

An act extending the time in which to file adverse claims and institute adverse suits against mineral entries in the District of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the District of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days period of publication or within eight months thereafter, and the adverse suits authorized and

provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office. [Approved June 7, 1910.]

An act to authorize the President of the United States to make withdrawals of public lands in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphate: *Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further,* That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided further,* That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals. [Approved June 25, 1910.]

An act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified person or persons, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: *Provided, however,* That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry. [Approved March 2, 1911.]

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